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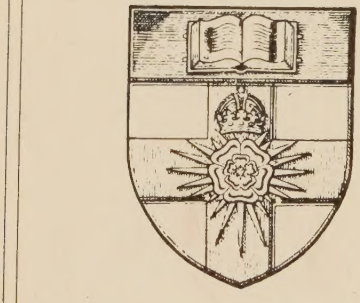

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IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

J. G. THOMPSON AND T. HENRY MAXWELL,

BARRISTERS-AT-LAW.

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Lord Chancellor.

The Right Hon. Sir Ignatius John O'Brien, Bart.

Lords Justices of Appeal.

The Right Hon. Stephen Ronan.

The Right Hon. Thomas Francis Molony.

Chancery Division.

The Right Hon. Charles A. O'Connor M.R.

The Hon. Dunbar Plunket Barton.

Land Judge.

The Right Hon. Judge Ross.

Irish Land Commission: Judicial Commissioners.

The Right Hon. J. O. Wylie.

The Hon. Gerald FitzGerald.

Attorneys-General.

The Right Hon. John Gordon.

The Right Hon. James H. M. Campbell.

Solicitor-General.

James O'Connor K.C.

[These Reports will be cited as follows :—[1916] 1 I. R.]

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Master of the Rolls,	William Lawson, A. H. Webb,	Barristers-at-Law.
Mr. Justice Barton,	R. W. Lucas, D. M. Steen,	Barristers-at-Law.
Land Judge,	T. C. Tobias,	Barrister-at-Law.
Land Commission,	John Edwd. Walsh,	Barrister-at-Law.

CORRIGENDA.

Page 15, *for* foot-note references "(2)" and "(3)" *read* "(1)" and "(2)".

,, 73, line 8 from end of judgment, *for* "mortgagee's" *read* "mortgagor's".

,, 293, for "*Moore* v. *Ffolliott*" read "*Moore* v. *Ffolliot*".

MEMORANDA.

On the 15th April, 1916, the Right Hon. John Gordon, His Majesty's Attorney-General for Ireland, was appointed a Judge of the King's Bench Division in Ireland, in the room of the Hon. Mr. Justice Boyd, resigned.

On the 15th April, 1916, the Right Hon. James Henry Mussen Campbell K.C. was appointed His Majesty's Attorney-General for Ireland.

On the 5th May, 1916, the Lord Lieutenant assigned the Right Hon. Mr. Justice Pim to dispose of Bankruptcy business, and the Right Hon. Mr. Justice Gordon to dispose of Admiralty business.

On the 5th July, 1916, the Right Hon. Christopher Palles, Lord Chief Baron, resigned.

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CASES

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1916.

HUGGARD *v.* THE REPRESENTATIVE CHURCH BODY.

M. R.
1915.
Mar. 18, 19, 26.
April 15.

(1914. No. 584.)

Principal and Surety—Collateral Security pro tanto *for Debt of Mortgagor—Liability of Surety limited in amount—Right of Surety on Payment of Part of Debt.*

A., the owner of lands mortgaged to the defendants for £13,000, demised part to B. for a term of years at the rent of £150. A. then agreed to sell to B., under the Purchase of Land (Ireland) Act, 1885, the part so demised, for the sum of £3000, to be secured by an instalment mortgage for that amount to the Irish Land Commission, and B. agreed to charge the part sold to him with £500 as collateral security *pro tanto* with the rest of the lands comprised in the mortgage to the defendants. In order to carry out this agreement the defendants joined in the conveyance, free from all incumbrances, of the part agreed to be sold to B., and B. mortgaged it to the Irish Land Commission to secure repayment of the £3000 by half-yearly instalments. B. then, by a

M. R. 1915.

HUGGARD *v.* REP. CHURCH BODY.

mortgage which recited the above transactions and that the debt due by A. had been reduced to £11,200, conveyed the part sold to him to the defendants, subject to redemption on payment of £500 and interest thereon.

Years afterwards the plaintiffs, in whom B.'s interest in the lands had become vested, sold the lands, subject to the annuity payable to the Irish Land Commission but free from all incumbrances, for £750, and on completion of the sale paid to the defendants the £500 and interest due under the mortgage made by B.

Subsequently most of the remaining lands of A. were sold under the Purchase of Land (Ireland) Acts, and the defendants received out of the purchase-money considerable sums on account of their mortgage debts, leaving a balance still due to them.

The plaintiffs brought this action against the defendants, claiming the benefit of all securities held by the defendants in respect of the said mortgage debt, and the benefit of all moneys received by the defendants on foot of the said debt in the proportion which the sum of £500 bore to the total of the said debt, on the ground that the plaintiffs were sureties for part only of the mortgage debt, and that, having paid that part, they were entitled to stand *pro tanto* in the shoes of the defendants, the principal creditors.

Held, (1) That B. had an interest in the transaction, namely the acquiring of the lands free from the mortgage save as to £500, and was therefore not a surety, but a principal debtor. (2) That even if B. could be regarded as a surety, he was not surety for part of the debt only, but for the whole debt, with a liability limited to £500, and that therefore the plaintiffs were not entitled to any relief, as the whole debt was not repaid.

TRIAL OF ACTION.

The following statement of facts is taken from the judgment of the Master of the Rolls:—

This action has been brought to establish the right of the plaintiffs, who may be treated as the representatives of one Richard Huggard, deceased, to participate in the benefits received by the defendants under two mortgages for £12,000 and £1,000 on the property of one Stephen Huggard, for whom it is alleged Richard Huggard was a surety to the extent of £500, part of the said mortgage debts. Richard Huggard's property was sold, and out of the proceeds of sale the £500 was paid to the defendants. A considerable part of Stephen Huggard's property has also been sold, and the defendants have been paid in round numbers the sum of about £10,000 in part discharge of the mortgages. The plaintiffs claim that they are entitled to be recouped

by the defendants a proportionate part of the sum of £500 in the ratio which the amount recovered bears to the full amount due upon the mortgages. In other words, they claim to be paid a dividend on the sum of £500 on the ground that the sums realized by the defendants were received by them on account of the entire debt, including the £500 received out of Richard Huggard's property. If this is the right of the plaintiffs, it is based on that branch of the law of guarantee which gives the surety, on payment of the debt, the right to the benefit of securities obtained from the principal debtor by the creditor.

The facts of the case are these:—By indenture of mortgage, dated the 30th March, 1874, Stephen Huggard, in consideration of an advance of £12,000, mortgaged to the defendants certain lands in the county of Kerry, subject to redemption on payment of £12,000, with interest thereon at the rate of £5 10*s.* per cent. per annum, reducible to £4 10*s.* on punctual payment. The mortgage deed gave power to the mortgagor at any time before sale to appoint by way of lease any part of the lands for any term of years to take effect in possession, so as there should be reserved the best yearly rent that could reasonably be got without taking a fine. By a further mortgage, dated the 9th April, 1874, Stephen Huggard, in consideration of a further advance of £1,000, mortgaged to the defendants the same lands, subject to redemption on payment of the further sum of £1,000, with interest at the rate of £5 10*s.* per cent. per annum, reducible to £4 10*s.* per cent. on punctual payment. In this mortgage there is included the additional security of an annuity payable out of other lands. It also reserves for the mortgagor the same leasing power as was given by the prior security.

On the 11th June, 1886, Stephen Huggard, in exercise of the leasing power contained in the two mortgages, made a lease to his son, Richard Huggard, of a portion of the mortgaged lands, viz., part of Lissatanavally, containing 15a. 1r. 10p. statute measure, and part of Lismore, containing 71a. 1r. 38p. like measure, for a term of years, at the yearly rent of £150. This lease was made without the sanction of the defendants.

Shortly after this lease was made Stephen Huggard agreed with Richard Huggard to sell to him the lands demised by the

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lease for the sum of £3,000, and the Irish Land Commission agreed to advance that amount to enable the purchase to be completed under the Land Purchase Act, 1885, one-fifth of the purchase-money to be retained by the Land Commission as a guarantee deposit as provided by the Act.

At this stage it becomes important to define the rights of the parties in connexion with the sale to Richard Huggard. It was the right of the mortgagor, notwithstanding the mortgages, to sell the lands to the tenants, but it was the right of the mortgagees to object to the prices as insufficient, and it was also their right to have the purchase-moneys, less by the guarantee deposits, applied in payment of the mortgage debts, or prior charges.

The purpose of the sale, however, was such as to require a partial waiver of their rights from the mortgagees. Stephen Huggard wanted part of the purchase-money for himself, and he asked the defendants to accept £1647 19*s.* 1*d.* on account, and to allow him to receive £600—the balance of the purchase-money to go in redeeming a tithe rentcharge, and providing the guarantee deposit. This the defendants agreed to. They were also asked by Stephen Huggard and Richard Huggard to sanction and approve of the lease. The reason for this was obvious. It was not a lease made in the ordinary course. It was made by a father to his own son, and apparently with the object of enabling the son to acquire the fee by purchase under the Act of 1885. The circumstances were such as would naturally excite suspicion and provoke investigation; and it was thought to be advisable, if not necessary, to get the defendants' approval of the lease. Be that as it may, the sale could not have been carried out in the way proposed without the concurrence of the defendants, who stipulated that, subject to the claim of the Land Commission on the purchased holding, they should in return for the concessions given by them have a charge upon it for £500 as collateral security for the moneys which should remain owing on the security of their mortgages.

This transaction was carried out by two conveyances.

The first was an indenture, dated the 25th July, 1887, made between Stephen Huggard of the first part, the defendants of the

second part, William Rowan, a puisne incumbrancer, of the third part, Richard Huggard of the fourth part, and the Irish Land Commission of the fifth part. It recited, *inter alia*, the two mortgages of £12,000 and £1000. It recited a subsequent mortgage then vested in William Rowan. It recited an agreement between Stephen Huggard and Richard Huggard for the sale by the former to the latter of the lands comprised in the lease in fee-simple, free from incumbrances, except a certain small annuity therein mentioned and against which there was an indemnity, and that Stephen Huggard had requested the defendants and William Rowan to join in the conveyance for the purpose of discharging the lands from their incumbrances. It then recited that Richard Huggard had applied to the Irish Land Commission for an advance of £3000 to enable him to complete the purchase, which the Commission agreed to give on the terms of retaining one-fifth part thereof as a guarantee deposit, and on having repayment of the sum of £3000 secured. It then recited that at the request of Richard Huggard and Stephen Huggard, and with the assent of the defendants and William Rowan, the Land Commission had applied the purchase-money as follows, viz.:—The sum of £152 0*s.* 11*d.* in redemption of a tithe rentcharge affecting the lands, and, at the request of Richard Huggard and William Rowan, the sum of £1647 19*s.* 1*d.* in payment to the defendants, and at the like request, and with the assent of the defendants and William Rowan, £600 in payment to the said Stephen Huggard, and the sum of £600 to be retained as a guarantee deposit. These recitals are followed by a conveyance by Stephen Huggard, the defendants, and William Rowan to Richard Huggard of the holding in fee-simple free from all incumbrances save the small annuity which I have already mentioned. Then comes a covenant by Richard Huggard with the Land Commission to pay an annuity of £120 for forty-nine years by means of which the advance was to be repaid, and then comes a conveyance by Richard Huggard to the Land Commission of the lands subject to a proviso for redemption on repayment of the annuity.

By another indenture, dated the 31st July, 1887, made between Richard Huggard of the one part and the defendants of

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the other part, reciting the two mortgages for £12,000 and £1000, the lease made by Stephen Huggard to Richard Huggard, that the same was made without the sanction or knowledge of the defendants, that Stephen Huggard had agreed to sell the holding to Richard Huggard, that both applied to the defendants to sanction and approve of the lease and to release the holding from the two mortgages for £12,000 and £1000, which the defendants agreed to do in consideration of Stephen Huggard paying to the defendants £1647 19*s.* 1*d.* on account of the principal sums due to them, and of having a lien on the guarantee deposit, and in further consideration of Richard Huggard charging the holding with a sum of £500 as collateral security *pro tanto* with the residue of the lands mentioned in the mortgages, that in part performance of the agreement the indenture of the 25th July, 1887, had been executed, that Stephen Huggard had paid to the defendants £1647 19*s.* 1*d.* on account of their mortgages, and that there remained due to them the sum of £11,200, it was witnessed that in pursuance of the agreement Richard Huggard conveyed the holding to the defendants in fee, subject to redemption on payment of £500 and interest.

The sum and substance of this transaction was, that Richard Huggard wanted to acquire the fee of the holding, that Stephen Huggard wanted to get £600, part of the purchase-money, that these two events could not be accomplished without the concurrence of the defendants, and as an inducement to the defendants to fall in with the arrangement, Richard Huggard, in consideration of getting the fee, agreed to charge it with £500 in favour of the defendants, and in substitution for the charge which they previously had.

The matter was carried out by the two conveyances I have described, by the first of which the defendants released their two mortgages, and by the second of which they got a new charge, but substantially this was only a way of releasing portion of the mortgage debts and postponing another portion to the mortgage to the Land Commission.

Richard Huggard died in the year 1890, intestate, and the plaintiffs, as his co-heiresses, became entitled to the purchased holding.

In or about the year 1908, the holding was sold for the sum of £750, and the defendants were paid the sum of £500 out of the purchase-money in discharge of the mortgage dated the 31st July, 1887. Further portions of Stephen Huggard's estate have been sold, and the defendants have been paid further sums amounting to about £10,000 on account of their mortgages.

The plaintiffs aver that Richard Huggard was only a surety for Stephen Huggard in the mortgage for £500, and that Richard Huggard's estate is entitled to an indemnity out of the proceeds of Stephen Huggard's estate, in the proportion which £500 bears to £11,200, the full amount due to the defendants when the transaction was entered into.

Samuels K.C., *M'Cann K.C.*, and *Leet*, for the plaintiffs:—

By the deed of the 31st July, 1887, Richard Huggard became surety for Stephen Huggard's debt, but only to the extent of £500. The fact that there was consideration for the transaction makes no difference. Whoever is liable to pay the debt of another, whether for value or gratuitously, as between him and the person originally or primarily liable, is a surety: *Imperial Bank* v. *London and St. Katherine Docks Company* (1), per Jessel M.R. If a guarantee is not made under seal, there must be a valuable consideration: Lord Halsbury's Laws of England, vol. xv, p. 451, where the requisites for consideration for a guarantee are stated. The use of the word "surety" is not necessary, if the legal effect of the transaction is to make the person a surety: *Stamford, Spalding, and Boston Banking Co.* v. *Ball* (2). Richard Huggard was surety for part only of the mortgage debt, namely £500, and on payment of that amount his representatives have all the rights of the creditor in respect of that amount, and are therefore entitled to a share in any security held by the creditor for the whole debt: *Thornton* v. *M'Kewan* (3); *Hobson* v. *Bass* (4); *Goodwin* v. *Gray* (5). The ordinary rule is, that when a surety is only a surety for part of the debt, and has paid that part of the debt, he is entitled to

(1) 5 Ch. D. 195, at p. 200.
(2) 4 De G. F. & J. 310.
(3) 1 H. & M. 525.
(4) L. R. 6 Ch. 792.
(5) 22 W. R. 312.

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receive the dividend which the principal debtor pays in respect of that sum which the surety has discharged: *Gray* v. *Seckham* (1); *In re Sass* (2). That rule applies here, and the plaintiffs are entitled to be paid a proportionate part of the £500. Forms of limited guarantee will be found in Davidson's Conveyancing (1881 Edition), vol. ii, part 2, p. 734, and in Prideaux's Conveyancing (1911 Edition), p. 802.

Walker K.C., and *E. S. Murphy*, for the defendants:—

The argument for the plaintiffs amounts to this, that if the respondents are paid the whole sum of £13,000, they are to repay to the plaintiffs £500. If so, what was the good of the deed of July 31st, 1887, to the defendants? It is said that the defendants were bound to pay a proportionate part of what they have received. We contend:—

First, that there was no suretyship here at all. The deeds of the 25th July and the 31st July, 1887, must be read together. It was all one transaction. The defendants became puisne mortgagees on the land sold to Richard Huggard to the extent of £500, instead of being first mortgagees on it and the other lands not sold to the extent of £11,200. Richard Huggard was vitally interested in the transaction, as he became owner of the lands released from the liability under the mortgage save as to £500. There is no covenant to pay in the deed of the 31st July, 1887, but that is not conclusive one way or the other. There was no relation of surety and creditor between Richard Huggard and the defendants, though as between Richard Huggard and Stephen Huggard one might be surety for the other: *Nicholas* v. *Ridley* (3); *Duncan* v. *Fox* (4). The form of the deed does not affect the question; the substance must be looked at. To create the relation of suretyship there must be some sort of a subsidiary contract on the part of one person to answer for the debt of another. That implies that the person who answers for the debt of another is not himself a debtor or interested in the transaction. That is not the case here. The sale through the medium of the

(1) L. R. 7 Ch. 680.
(2) [1896] 2 Q. B. 12.
(3) [1904] 1 Ch. 192.
(4) 6 A. C. 1.

Irish Land Commission was a family arrangement between father and son. The father made a letting to the son, and father and son negotiated a sale through the Land Commission. The son was vitally interested in the sale through the Land Commission, and was not answerable for the debt of another person, but he was making an arrangement by which his property would be released to a certain extent from liability. There must be an absence of all liability or interest on the part of the promisor (the surety), except such as arises from his express promise: De Colyar on Guarantee, p. 130; *Sutton* v. *Grey* (1), where Lord Esher cites with approval a passage from the judgment of Cockburn C.J. in *Fitzgerald* v. *Dressler* (2), in which he says that the law on the subject (*i.e.*, whether the case is within s. 4 of the Statute of Frauds) is correctly stated in the notes to *Forth* v. *Stanton* (3), "it being, as I think, truly stated there as the result of the authorities, that, if there be something more than a mere undertaking to pay the debt of another, as where the property in consideration of the giving up of which the party enters into the undertaking is in point of fact his own, or is property in which he has some interest, the case is not within the provision of the statute, which was intended to apply to the case of an undertaking to answer for the debt, default, or miscarriage of another, where the person on making the promise has himself no interest in the property which is the subject of the undertaking." Richard Huggard's property was subject to the mortgage to the defendants; they released it from their mortgage, and he charged it with payment of £500, subject to a mortgage to the Land Commission for £3000, so that he had an interest in the property which he agreed to charge as collateral security for Stephen Huggard's debt.

Secondly: even assuming that Richard Huggard was surety for Stephen Huggard, Richard Huggard could not get any relief except by paying the whole amount of the mortgage debt and interest, and not merely £500 and interest. The word "collateral" is used in the deed of the 31st July, 1887, but that word has no

(3) [1894] 1 Q. B. 285.
(4) 7 C. B. N. S. 392.
(5) 1 Wms. Saund. 211e.

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specific meaning. Collateral security may mean additional or further security. See *Athill* v. *Athill* (1), where the meaning of the word was discussed, and it was held not to mean "secondary." In all the cases cited for the plaintiffs the debt of the principal debtor was unascertained in amount and fluctuating; but here the debt was ascertained, and a different rule applies. The effect of the authorities is well stated in Lord Halsbury's Laws of England, vol. xv, p. 475: "Where a surety gives a continuing guarantee, limited in amount, to secure a floating balance which may from time to time be due from the principal debtor to the creditor, the guarantee is, as between the surety and the creditor, to be construed, prima facie at least, as applicable to a part only of the debt co-extensive with the amount of the guarantee; while, on the other hand, a guarantee, limited in amount, for a debt already ascertained, which exceeds that limit, is not prima facie to be construed as a security for part of the debt only, it being for the court to determine in such cases whether the intention was to guarantee the whole debt, with a limitation on the liability of the surety, or to guarantee a part of the debt only." This statement of the law is taken from *Ellis* v. *Emmanuel* (2), where Blackburn J. distinguishes *Gray* v. *Seckham* (3), and the other cases cited. *In Re Sass* (4) was the case of an unascertained amount, like the case referred to in *Ellis* v. *Emmanuel* (2); but there Vaughan Williams J. held that the surety became a surety for the whole of the debt. *Forbes* v. *Jackson* (5) shows that the surety must pay the whole debt before he can get a transfer of the securities.

The plaintiffs claim the benefit of the securities which the defendants have, as the right of the surety is to have the benefit of every security which the creditor has against the principal debtor; but this means when the creditor is paid in full, and, unless he has contracted to do so, the creditor is not bound to give up to the surety securities which by law he is entitled to make available against the principal creditor: *Fairbrother* v. *Woodhouse* (6).

(1) 16 Ch. D. 211.
(2) 1 Ex. D. (C. A.) 197.
(3) L. R. 7 Ch. 680.
(4) [1896] 2 Q. B. 12.
(5) 19 Ch. D. 615.
(6) 23 Beav. 24.

McCann K.C., in reply :—

It is said that to give effect to the plaintiffs' contention would lead to extraordinary results, as they would get back nearly all the money they had paid; but decisions often give rise to extraordinary results, e.g. *Hobson* v. *Bass* (1), and cannot affect legal principles. If the intention of the instrument of guarantee is to guarantee a part only of the debt, the surety's right can be exercised the moment the limit of his guarantee has been reached, and he has been obliged to make payment thereunder: De Colyar on Guarantee, p. 337. The right of a surety to the benefit of all the securities held by the creditor is not necessarily dependent upon contract, but is the result of the equity of indemnification attendant on the suretyship: *Ib.*, p. 322. The main thing to be considered is the relation between the principal debtor and the person who says that he is a surety; the principle of indemnification may be departed from by express agreement or waiver. If Richard Huggard was surety for Stephen Huggard, is there anything in the documents to entitle the Court to spell out something showing that, notwithstanding the suretyship between Richard and Stephen, Richard was to be regarded as a principal debtor? The cases cited as to the meaning of a guarantee within section 4 of the Statute of Frauds do not apply here. The defendants could not have sued Richard Huggard for the £500, as there was no covenant to pay in the deed of the 31st July, 1887. The proviso for redemption is that the lands are to be reconveyed at the request of Richard, no matter who paid them off. "If the payment of a debt of a third party be the main object of a contract, the Statute of Frauds applies, whatever be the motive for entering into it": Lord Halsbury's Laws of England, vol. xv, p. 664. The word "collateral" is often used in contradistinction to principal. In Prideaux on Conveyancing, vol. i, p. 802, the phrase occurs, "principal and not a collateral security." In Fisher on Mortgages, p. 1347, occur the words, "and not one as surety or collateral security for the other."

[The case was further argued on the first question, whether

(1) L. R. 6 Ch. 792.

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Richard Huggard was a surety, and the following authorities were referred to:—*Harburg India Rubber Comb Company* v. *Martin* (1); *Darys* v. *Buswell* (2); *Morris* v. *Cleasby* (3); per Lord Ellenborough C.J., p. 574; De Colyar on Guarantee, p. 149.]

Cur. adv. vult.

April 15. O'CONNOR M.R., having stated the facts as above, continued as follows:—

It is certainly the right of a surety, on paying the principal debtor's liability, to get a transfer of any securities obtained by the creditor from the principal debtor. It is on this doctrine that the plaintiffs' claim is founded, and their case depends on this, that Richard Huggard's part in the transaction was that of a surety.

Assuming for a moment that he was a surety, he was something more. He was the purchaser of a parcel of land on which the principal creditors had a mortgage much larger than the value of the lands, and, in the circumstances, the sale could not be carried through without the concurrence of the mortgagees. An arrangement was then made under which the mortgagees were to get part of the purchase-money, the mortgagor another part, and a new charge for a limited amount was to be given to the mortgagees by the purchaser. Here the purchaser was getting a substantial gain for himself. He was acquiring a property from the creditors, and it was as much in consideration of that, as of the extension of credit to Stephen Huggard, that the mortgage for £500 was given. The creditors not merely waived the security which they held from the debtor, but also conveyed it to the person for whom the character of surety is claimed.

Apart altogether from authority, it strikes me that a person having such an interest as the purchaser in the present case had, is outside the equity of a surety. The favour of the Court has always been extended to a surety as a person who has assumed liability for the benefit of another without having any personal interest in the subject-matter of the transaction. But if he is himself concerned in it—if he enters into the contract for the

(1) [1902] 1 K. B. 778.
(2) [1913] 2 K. B. 47.
(3) 4 M. & S. 566.

purpose of acquiring something for himself—there is no essential difference in character between him and his co-contractor; his position does not evoke the favour which mere suretyship attracts. Indeed I doubt very much if the character of surety can be given to him at all.

There is a line of authorities which bear closely on this question. They arose under s. 4 of the Statute of Frauds, the question being whether the contract sprung from a promise to answer for the debt, default, or miscarriage of another person, and should have been in writing. Such a promise is one of suretyship, and decisions under the section as to the class of contract which comes within it must have an intimate bearing on the present case.

I think that a consideration of the authorities I have referred to will show that the test of a contract of suretyship is not to be found in its result in discharging the liability of another, but in its main object being to secure another's debt, in the payment of which the promisor has no interest, and for which he has no liability except such as attaches by reason of the promise to pay. If the promisor has himself an interest in the transaction, he is more than a guarantor—he is a principal debtor.

The law upon this subject is so fully reviewed in the judgment of Lord Esher in *Sutton* v. *Grey* (1) that it will not be necessary to go behind it for authorities. This was a case in which the plaintiffs, who were stockbrokers, entered into an oral agreement with the defendant that he should introduce clients to them, and that the plaintiffs should transact business on the stock exchange for the clients thus introduced, on the terms that, as between the plaintiffs and the defendant, the defendant should receive half the commission earned in respect of any transactions by them for any clients introduced by the defendant, and that he should pay the plaintiffs half of any loss which might be incurred by them in respect of such transactions. The legal question was whether that contract was a contract of guarantee which should be in writing under s. 4 of the Statute of Frauds. Lord Esher says, at p. 287: "Is

(1) [1894] 1 Q. B. 285.

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such a contract a simple contract of guarantee, a 'special promise to answer for the debt or default of another person' so as to bring the case within s. 4 of the Statute of Frauds, or is it a contract of indemnity? Whether any contract is the one or the other is often a very nice question. But certain tests have been laid down to guide the Court in determining under which head any particular contract comes. The principal case in English law which affords such a guide is *Couturier* v. *Hastie* (1). In that case a test was given by Parke B., who delivered the judgment of himself and Alderson B. (from whom Pollock C. B. differed as to the construction of the contract). The learned judge said (at p. 55): 'The other and only remaining point is, whether the defendants are responsible by reason of their charging a del credere commission, though they have not guaranteed by writing signed by themselves. We think they are. Doubtless, if they had for a percentage guaranteed the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale' (I would read that 'totally unconnected with the transaction') 'they would not be liable without a note in writing signed by them; but, being the agents to negotiate the sale' (that is, as I read it, 'being connected with the transaction') 'the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all questions, whether the loss arose from negligence or not, and also for assuming a greater responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them, and though it may terminate in a liability to pay the debt of another that is not the immediate object for which the consideration is given.' There the test given is whether the defendant is interested in the transaction, either by being the person who is to negotiate it or in some other way, or whether he is totally unconnected with it. If he is totally unconnected with it, except by means of his promise to pay the loss, the contract is a guarantee; if he is not totally unconnected with the transaction, but is to derive some benefit from it, the contract is one of indemnity, not a guarantee, and s. 4 does not

(1) 8 Ex. 40.

apply." So here, though the contract by Richard Huggard terminated in a liability to pay, if he entered into it with the object of acquiring the lands for himself, the case comes within this principle. It cannot be said that he was totally unconnected with the transaction. Lord Esher goes on: "The rule thus laid down has been adopted as a test in subsequent cases. In *Fitzgerald* v. *Dressler* (1), Cockburn C. J. said (at p. 392): 'The law upon this subject is, I think, correctly stated in the notes to *Forth* v. *Stanton* (2), where the learned editor thus sums up the result of the authorities: 'There is considerable difficulty in the subject, occasioned by unguarded expressions in the reports of the different cases; but the fair result seems to be that the question whether each particular case comes within this clause of the statute (s. 4) or not depends, not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.' I quite concur in that view of the doctrine, provided the proposition is considered as embracing the qualification at the conclusion of the passage; for, though I agree that the consideration alone is not the test, but that the party taking upon himself the obligation upon which the action is brought makes himself responsible for the debt or default of another, still it must be taken with the qualification stated in the note above cited, viz., an absence of prior liability on the part of the defendant or his property, it being, as I think, truly stated there as the result of the authorities that if there be something more than a mere undertaking to pay the debt of another, as where the property in consideration of the giving up of which the party enters into the undertaking is in point of fact his own, or is property in which he has some interest, the case is not within the provision of the statute, which was intended to apply to the case of an undertaking to answer for the debt, default, or miscarriage of another, where the person making the promise has himself no interest in the property which is the subject of the undertaking. I therefore agree with my learned brothers that this case is not within the Statute of Frauds.'" (That applies here, for Richard

(2) 7 C. B. (N. S.) 374. (3) 1 Wms. Saund. 211e.

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Huggard was acquiring property for himself.) "The learned judge there used the words 'has himself no interest in the property which is the subject of the undertaking,' because he was dealing with a case of property; but if his words be read, as I think they should be, 'has no interest in the transaction,' he is adopting that interpretation of *Couturier* v. *Hastie* (1) which I think is the right one." Lopes L.J. says at p. 290:—"The true test, as derived from the cases, is, as the Master of the Rolls has already said, to see whether the person who makes the promise is, but for the liability which attaches to him by reason of the promise, totally unconnected with the transaction, or whether he has an interest in it independently of the promise."

Applying the principles here laid down, let us see how they rule the present case. Was there an absence of liability on Richard Huggard or his property, save such as arose from the promise to guarantee the defendants' mortgage? Had Richard Huggard no interest in the transaction? It is quite clear that Richard Huggard had a vital interest in it. One part of the transaction was that he was to become the purchaser in fee of his farm on very advantageous terms. There was, moreover, a liability to the defendants charged on the fee of the farm, and that liability was bought off. The case, therefore, seems to me to come very clearly within the principles laid down in *Sutton* v. *Grey* (2).

I come now to the case of the *Harburg India Rubber Comb Co.* v. *Martin* (3). In that case the defendant, who was a director and large shareholder in a company, orally promised the plaintiffs, who were judgment creditors of the company, and who had delivered to the sheriff a writ of fi. fa., on which the sheriff had failed to levy because he could not effect an entry, that he the defendant would endorse bills for the amount of the debt. It was held that this was a contract of guarantee, and that it was not taken out of s. 4 of the Statute of Frauds by reason of the defendant's interest in the company as a shareholder. The case is of importance for the present purpose on account of the principles of law which are laid down in the judg-

(1) 8 Ex. 40. (2) [1894] 1 Q. B. 285. (3) [1902] 1 K. B. 778.

ments of the Court of Appeal. Speaking of the cases which were held not to be contracts of guarantee within s. 4 of the Statute of Frauds, Vaughan Williams L.J. says:—"In each of those cases there was, in truth, a main contract—a larger contract—and the obligation to pay the debt of another was merely an incident of the larger contract. As I understand those cases it is not a question of motive—it is a question of object. You must find what it was that the parties were in fact dealing about. What was the subject-matter of the contract? If the subject-matter of the contract was the purchase of property, the relief of property from a liability, the getting rid of incumbrances, the securing greater diligence in the performance of the duty of a factor, or the introduction of business into a stockbroker's office, in all those cases there was a larger matter which was the object of the contract. That being the object of the contract, the mere fact that as an incident to it—not as the immediate object, but indirectly—the debt of another to a third person will be paid, does not bring the case within the section"—or, in other words, the contract is not a contract of guarantee.

Now, apply that to the present case. Surely the object of Richard Huggard in entering into an agreement with the Representative Church Body to give them a charge of £500, was to free the property which he had agreed to purchase from the much larger charge of £11,200 which in the circumstances blocked the sale. The case comes within the very letter of the principle enunciated by Vaughan Williams L.J.

This brings me to the latest decision on this subject. In *Davys* v. *Buswell* (1) the plaintiff agreed to be answerable for the price of goods to be supplied to a company of which he was both a shareholder and debenture holder. It was found by the jury that the plaintiff was induced to enter into the contract by the fact that he had a debenture charge on the assets of the company. It was held that the agreement was a guarantee. Vaughan Williams L.J. gave one of the judgments in this case also. He again reviewed the authorities. He does not depart from what he had laid down in *Harburg India Rubber Comb Co.* v. *Martin* (2), but he winds up his judgment by saying:—"I do

(1) [1913] 2 K. B. 47. (2) [1902] 1 K. B. 778.

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not think that, in any sense in which the word 'interest' has been used in any of the prior cases on the subject, the plaintiff here had any such interest as would make it true to say that he gave the guarantee by reason of any liability or obligation which existed independently of the guarantee, or that he was contracting for the protection of any right." This surely does not apply to the present case, in which the plaintiff bought off a specific charge which affected the property he had agreed to purchase. The distinction is most clearly brought out by the judgment of Joyce J., who at p. 59 says:—"The present case has no analogy to a case where a person who has purchased, or who has an interest in, goods which are subject to a lien or charge, obtains a discharge of the lien or charge by undertaking to be responsible for payment of the debt in respect of which it existed." This seems to me to be an accurate description of what Richard Huggard accomplished in his deal with the Representative Church Body. The judgment of Joyce J. is a re-affirmance of the law established by *Fitzgerald* v. *Dressler* (1). His point is put in language exceedingly like that used in the judgment of Williams J., in *Fitzgerald* v. *Dressler* (1), which was:—"The effect of the promise was neither more nor less than this, to get rid of the incumbrance, or, in other words, to buy off the plaintiff's lien. That being so, it seems to me that the authorities clearly establish that such a case is not within the statute." This description of the contract is also precisely applicable to Richard Huggard's transaction.

On the authorities, then, I hold that the present case is not one of guarantee—that if there is to be found in it the element of security given for the debt of another, that was only an incident in a transaction the main object of which was the acquisition of property by the person giving the security—that it was in fact the buying off of one charge by substituting another in its place, the purchaser being as much a principal in the transaction as the original debtor.

Apart from all authority I would come to the same conclusion. As I have already said, the conveyances by which the transaction was carried out took the form of an absolute release of the

(1) 7 C. B. N. S. 374.

original charge, and the imposition of a new charge in favour of the defendants. This mode of conveyancing was a necessity, having regard to the provisions of the Land Purchase Act, 1885, and the usual requirements of the Land Commission, but in substance the transaction was nothing more than the postponement of £500, part of the defendants' charge, to the Land Commission annuity, and the release of the residue of the charge.

Holding this opinion it is really unnecessary for me to deal with other aspects of the case; but I do not wish to part from it without taking the notice which they deserve of the arguments of plaintiffs' counsel. Mr. Samuels' argument was that Richard Huggard was a surety for only part of the debt due to the defendants, and that he was therefore entitled to a proportionate part of all dividends received on account of the whole debt. Assuming that Richard Huggard was a surety for only part of the debt, that would have been his right. I have already dealt with the question, was Richard Huggard a surety? Let us now see whether, if he was a surety, he was one for only part of the debt. This must depend upon the terms of the deed; but as its construction has been very strenuously discussed, it is well to notice certain rules of construction which govern contracts of guarantee. These rules are, I believe, correctly stated on p. 475 of vol. xv of Lord Halsbury's Laws of England. They have the eminent authority of Mr. de Colyar, and have been established by the cases cited. The passage I refer to is as follows:—"Difficult questions of construction often arise, when a guarantee limits the pecuniary liability of a surety to a certain fixed sum, as to whether the suretyship is in respect of the whole debt, with a limitation on the liability of the surety, or is applicable to a part only of the debt, co-extensive with the amount of the guarantee. In solving such questions the following principles apply, namely: where a surety gives a continuing guarantee, limited in amount, to secure a floating balance which may from time to time be due from the principal to the creditor, the guarantee is, as between the surety and the creditor, to be construed, prima facie at least, as applicable to a part only of the debt co-extensive with the amount of the guarantee, while, on the other hand, a guarantee,

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limited in amount, for a debt already ascertained, which exceeds that limit, is not prima facie to be construed as a security for part of the debt only, it being for the Court to determine in such cases whether the intention was to guarantee the whole debt, with a limitation on the liability of the surety, or to guarantee a part of the debt only."

In the present case the debt due to the defendants was a limited and ascertained amount, so that it is not the prima facie construction that the guarantee covered only part of the debt. It is for the Court to determine from the transaction whether the guarantee was for the whole debt, with limited liability, or only for part of it. In the deed of the 31st July, 1887, it is recited that the defendants agreed to sanction and approve of the lease, and to release the holding, in consideration of three things—(1) a payment of £1647 19*s.* 1*d.*; (2) having a lien on the guarantee deposit; (3) Richard Huggard charging the holding with £500 as collateral security *pro tanto* with the residue of the lands. I construe this third element as meaning a further security for the debt, with a limitation of liability to £500. This is, I think, the natural meaning; and when No. (3) is read along with No. (2), viz., the lien on the guarantee deposit, I think that meaning gets support from it, because the guarantee deposit was certainly part of the security for the entire debt. But to my mind the most important element in the whole transaction is that the new charge is in substitution for an old one, which was security for the entire debt, and that the object of the parties was merely to make title for the purchaser, reducing the liability of his holding from £11,200 to £500. This intention was fully carried out by leaving the holding liable along with the residue of the lands for £11,200, with a limited liability for £500. On this branch of the case I am consequently of opinion that before the plaintiffs could assert any claim to benefit in the security held by the defendants their entire debt should be paid.

I dismiss the action with costs.

Solicitors for the plaintiffs: *George Bernard & Son.*

Solicitors for the plaintiffs: *Maunsell, Darley, & Orpen.*

W. L.

IN THE MATTER OF THE ESTATE OF W. D. HUMPHREY.

Ross v.
1915.
Nov. 10, 29.

Will—Construction—Absolute Gift or Precatory Trust.

A testator, having left all his property, real and personal of every kind, to his wife, added the words: "I express the wish that she should leave by her will, or transfer during her life, as she shall think fit, my house and demesne of K. to my son John . . . The remainder of my property I wish to be left, or transferred, to my daughters, Elinor Frances Beatrice and Margaret Lilian, in such way as" his wife should think fit.

Held, that the widow took an absolute interest.

MOTION.

John Edmund Longfield, of Kilcoleman, Enniskeane, Co. Cork, died on the 12th June, 1913, having made his will, dated the 1st March, 1912, in the following terms:—"I John Edmund Longfield, of Kilcoleman, Enniskeane, Co. Cork, do hereby make this my last will and testament. I revoke all former wills. All my property, real and personal of every kind, I leave to my wife, Elinor Mary Augusta, and I appoint her the sole executrix of this my last will and testament. I express the wish that she should leave by her will, or transfer during her life, as she shall think fit, my house and demesne of Kilcoleman to my son John Foster, with sufficient money for his and its maintenance, but not before he has reached the age of twenty-five years. The remainder of my property I wish to be left, or transferred, to my daughters, Elinor Frances Beatrice and Margaret Lilian, in such way as the said Elinor Mary Augusta shall see fit."

John Edmund Longfield died on the 12th June, 1913, and probate of his will was granted to his executrix, Elinor Mary Augusta Longfield.

The testator left issue, one son and three daughters, viz., John Foster Longfield, Elinor Frances Beatrice Longfield, and Margaret Lilian Longfield, who were living at the date of the execution of his will, and Frances Emily Lydia Longfield, who was born after the date of the will.

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The property left by the testator included a fee-farm rent of £37 8*s.* 9*d.* *per annum*, payable out of the lands of East Ballyspillane, sold in the present matter, which rent was redeemed for the sum of £900. When the matter came before the examiner, he required that the questions arising out of the testator's will should be judicially determined. Accordingly, the present application was made to the Court by Mrs. Elinor Mary Augusta Longfield, asking for a declaration that, upon the true construction of the will, she was absolutely entitled to all assets, real and personal, of the said testator.

Conner K.C., for the applicant, Mrs. Longfield :—

It is the duty of the Court to find, if possible, the testator's real intention. It is submitted that he intended to give his wife everything. It is clear that the first clause amounts to an absolute beneficial bequest; but it is suggested that the words which follow cut it down to a life interest. Equitable obligations are imposed when language sufficient to impose them is used; but the present trend of judicial opinion is against precatory trusts. The cases on the subject are collected in Jarman on Wills (1910 ed.), pp. 876–882. It is always a question of intention in these cases whether a trust arises or not: *Hill* v. *Hill* (1). If there is a trust here, Mrs. Longfield could not sell a bedstead or give away a ring without committing a breach of trust. If a testator really means his recommendation to be imperative, he should express his intention in a mandatory form: *In re Williams* (2). There is nothing here to make "wish" bear any other than its natural meaning. [He also referred to *In re Diggles* (3) and *In re Oldfield* (4).]

Norwood K.C., for Henry F. Longfield, guardian *ad litem* of the three children named in the will :—

In this will there is a singular absence of any words like the word "absolutely," or words of limitation which might give the Court a clue. Here the testator gives property to his wife, and then proceeds to deal with the whole of it. *In re Williams* (2) is

(1) [1897] 1 Q. B. 483.
(2) [1897] 2 Ch. 12.
(3) 39 Ch. D. 253.
(4) [1904] 1 Ch. 549.

distinguishable. In the first place, the precatory words were applied to the wife's property as well as the testator's own; secondly, the words used were "heirs, executors, and assigns, absolutely"; and thirdly, the words "in trust" were actually used where the testator intended to create a trust. The rule was laid down as early as 1794 by Lord Alvanley M.R. in *Malim* v. *Keighley* (1): "Wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it"—a statement of the law approved by Lord Lyndhurst and Lord Cottenham in *Knight* v. *Boughton* (2), and held to be the law in *In re Oldfield* (3). The latest authorities on the point are *Alexander* v. *Burley* (4) and *In re Jevons* (5).

Conner K.C., in reply:—

The absence of the word "absolutely," or its equivalent, proves nothing. What is there to show that Mrs. Longfield took only a life estate? The language used in *In re Jevons* (5) is quite different from that which the Court has to construe here.

Cur. adv. vult.

Nov. 29.

Ross J.: [His lordship having stated the facts and read the will, proceeded as follows:—]

The earlier words in the will confer an absolute interest on the wife. The question is whether the later clauses cut down this interest to an estate for life. In the latter event the daughter who was born after the date of the will is altogether excluded from participation. To the ordinary man of intelligence, uninstructed in the doctrine of what are called precatory trusts, it would, no doubt, cause astonishment that there could be any doubt about the true meaning of this will.

The testator in clear words gives all his property to his wife, and appoints her executrix. He then expresses a wish that she should dispose of it for the benefit of his children in a certain way.

(1) 2 Ves. Jun. 333.
(2) 11 Cl. & F. 513, 548.
(3) [1904] 1 Ch. 549.
(4) [1910] 1 Ch. 215.
(5) 56 S. J. 72.

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I am sure the testator himself would have been amazed if the mere expression of his wish for the guidance of his wife should have the effect of creating a legal obligation of the strictest character, tying up all the property and preventing her from providing for any children that might be born after the making of the will. After a devise and bequest in clear and explicit terms, if a trust is intended to be created one would expect that this would be done in terms equally clear and explicit. When we come to consider the innumerable decisions in which the Courts of equity have displayed their benevolent astuteness in imposing an obligatory meaning upon words merely expressive of desire, the mind is reduced to a condition of perplexity and confusion. Trusts have been held to be created by the following expressions:—"I desire him to give," "I advise him to settle," "It is my dying request," "It is my will and desire," "I recommend," "Well knowing," and such like. All these one would think impose at most a moral obligation. On the other hand, an expression of hope that the devisee would continue the estate in the family has been held to create no trust. I think it is quite impossible to reconcile the cases. However that may be, there is no doubt that the tide has turned and is running strong against precatory trusts.

In *Lambe* v. *Eames* (1) Lord Justice James said:—"In hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery, in interposing trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed." These words are approved of by Lopes L.J. in *Hill* v. *Hill* (2), who further says: "It is inconceivable to me that a testator who really meant his hope, recommendation, confidence, or request to be imperative should not express his intention in a mandatory form. I agree with Mr. Farwell in his book on Powers, when he says at p. 480, 'It would not be a very strained inference to regard all such expressions as stating the motive that induced the absolute gift rather than as a fetter imposed upon it.'" He adds, "It is in

(1) L. R. 6 Ch. 597, at p. 599. (2) [1897] 1 Q. B. 483, at p. 488.

every case a question of intention, and the whole document with the surrounding circumstances must be considered."

Lord Lindley says in *In re Hamilton* (1):—"You must take the will which you have to construe and see what it means, and if you come to the conclusion that no trust was intended, you say so, although previous judges have said the contrary on some wills more or less similar to the one which you have to construe."

Lord St. Leonards, in his work on the Law of Property, published in 1849, wrote as follows (p. 375):—"The law as to the operation of words of recommendation, confidence, request, or the like, attached to an absolute gift, has in late times varied from the earlier authorities. In nearly every recent case the gift has been held to be uncontrolled by the request or recommendation made or confidence expressed. This undoubtedly simplifies the law, and it is not an unwholesome rule that, if a testator really mean his recommendation to be imperative, he should express his intention in a mandatory form; but this conclusion was not arrived at without a considerable struggle."

Lord Lindley approves of these words in *In re Williams* (2), and calls it a sensible rule. In the same case he puts the matter thus (at p. 18):—"There can be no doubt that equitable obligations, whether trusts or conditions, can be imposed by any language which is clear enough to show an intention to impose an obligation, and is definite enough to enable the Court to ascertain what the precise obligation is, and in whose favour it is to be performed. There is also abundant authority for saying that, if property is left to a person in confidence that he will dispose of it in a particular way as to which there is no ambiguity, such words are amply sufficient to impose an obligation. . . . Unless it appears from the whole will that an obligation was intended to be imposed, no obligation will be held to exist; yet, moreover, in some of the older cases obligations were inferred from language which in modern times would be thought insufficient to justify such an inference."

In *In re Hamilton* (1) a testatrix left legacies to her two nieces, and added, "I wish them to bequeath the same equally between

(1) [1895] 2 Ch. 370, at p. 373. (2) [1897] 2 Ch. 12.

Ross J. 1915. *In re* HUMPHREY'S ESTATE.

the families of O and P." The English Court of Appeal held that these words merely amounted to an expression of the wish of the testatrix, and created no trust in favour of the families indicated.

In *In re Diggles* (1) the Court held that in considering whether on the whole will the testator's intention was to create a trust, regard may be had to any embarrassment and difficulty which would arise from a trust. Applying this to the case before me, surely the possibility that children might be born to the testator after making his will, for whom his wife could not provide, is such an embarrassment and difficulty.

In *Wright* v. *Atkyns* (2), which was much relied on in the contention in favour of a trust, it was laid down (at p. 157) that three things are required to create such a trust:—(1) the words must be imperative; (2) the subject must be certain; (3) the object must be certain. Assuming certainty in the subject and object indicated in this will, am I obliged to hold the words used imperative? I think not.

The outcome of the cases is simply this, that the words are to be interpreted in their ordinary sense, unless there is something in the terms of the will operating upon the property disposed of, from which a Court ought to infer that a trust is intended or a condition imposed. In this will there is not a trust, in language, from the beginning to the end of it, or anything in the will from which a trust can be legitimately inferred.

I therefore hold that Elinor Mary Augusta Longfield took the property absolutely uncontrolled by any legal obligation, and I make a declaration accordingly in respect of the £900 now in Court.

Solicitors for Mrs. E. M. A. Longfield: *Thomas Exham & Son.*
Solicitor for H. F. Longfield: *R. A. Howe.*

T. C. T.

(1) 39 Ch. D. 253. (2) Turn. & R. 143.

GRAHAM *v.* EAKIN.

Ross J.
1915.
Dec. 7.

Practice—Injunction—Probate action remitted to County Court—Civil Bill not issued, and no Sessions pending—County Officers and Courts (Ireland) Act, 1877 (40 & 41 *Vict. c.* 56), *s.* 44—*Jurisdiction of the Lord Chancellor.*

The jurisdiction given to the Lord Chancellor by section 44 of the County Officers and Courts (Ireland) Act, 1877 (1), to grant an injunction during the intervals between the sittings of the Civil Bill Court, is confined to proceedings in equity; and, therefore, where a contentious probate cause is sent to the Civil Bill Court under sect. 63 of the Court of Probate Act (Ireland), 1857, there is no jurisdiction under sect. 44 of the County Officers and Courts (Ireland) Act, 1877, to grant an injunction during an interval between the sittings of the Civil Bill Court restraining the defendant from interfering with the assets pending the hearing of the suit.

Semble, the proper course in such a case is to apply to the judge of the King's Bench Division (Probate).

MOTION for the sitting of the Court.

The notice of motion was entitled, "In the matter of section 44 of the County Officers and Courts (Ireland) Act, 1877; and in the matter of a Probate Civil Bill in the County Monaghan, between the Reverend James Graham and James Oliver, executors of the will of Robert Eakin, . . . deceased, plaintiffs; and Joseph Eakin and Mary Eakin, . . . defendants"; and stated that at the sitting of the Court application would be made by counsel on behalf of the plaintiffs to the Lord Chancellor, or other the Judge of the Chancery Division to whom the matter might be assigned, for an order restraining the defendants from selling or disposing of the stock and chattels on the lands of the

(1) 40 & 41 Vict. c. 56, s. 44:—"During the intervals between the sittings of the Civil Bill Court in any county any party to any suit or proceeding pending in the Civil Bill Court of such county may apply for an injunction to the Lord Chancellor, who shall have the same power to grant an injunction as he would have had if the suit had been instituted in the Court of Chancery; and the granting of any such injunction shall not operate to remove such suit from the Civil Bill Court unless the Lord Chancellor shall otherwise direct."

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deceased at Shanco in the County of Monaghan, pending the hearing of a testamentary suit in the Monaghan County Court.

The motion came on for hearing before Ross J., one of the judges to whom such applications had been assigned by order of the Lord Chancellor, dated the 6th February, 1904.

The facts, in so far as they are material to the present report, were as follows:—

The deceased, Robert Eakin, died on the 27th June, 1915, having previously made a will, dated the 6th May, 1915, whereby he left his farm at Shanco, and all the chattels thereon, to the defendant, Joseph Eakin, for life, subject to the liability to support and maintain the defendant, Mary Eakin, and, after the death of Joseph Eakin, to Samuel Oliver, son of the plaintiff, James Oliver. The executors named in the will (the plaintiffs) having applied for a grant of probate, it was found that a caveat had been lodged by the defendant. A warning was duly entered to the caveat, and an appearance entered to the warning; and on the 27th October, 1915, a certificate was obtained from the Principal Registry of the High Court of Justice in Ireland, King's Bench Division (Probate), that the estate was within the County Court jurisdiction. On the 16th November, 1915 (there being no sitting of the county court at the time, and the date for holding the Hilary sessions not having been announced), an application was made *ex parte* on behalf of the plaintiffs to the county court judge of Monaghan, at his residence in Dublin, for an injunction restraining the defendants from disposing of the stock on the farm. The county court judge being doubtful whether he had jurisdiction to make the order, the present application was made under section 44 of the County Officers and Courts (Ireland) Act, 1877, to Ross J., the probate civil bill having in the meantime, viz., on the 25th November, 1915, been issued.

When the motion was called, *Dickie K.C.* (with him *J. C. Lardner*), for the defendants raised the point that the Court had no jurisdiction to entertain the application.

E. S. Murphy, for the plaintiffs :—

When it was found necessary to make the application there was no sitting of the county court, and accordingly the proper course was to follow the procedure laid down in section 44 of the Act of 1877. I am properly before the Court. If I cannot get relief here I cannot get it anywhere. Once the case is remitted to the county court judge the probate judge has no jurisdiction.

Dickie K.C. :—

The section does not apply to proceedings like these at all. The jurisdiction under it is only equitable, and the Lord Chancellor has only power to intervene in a Chancery suit.

Nothing has been sent to the county court judge except the actual dispute about the will. The assets remain within the jurisdiction of the High Court, which has power to appoint an administrator *pendente lite.*

Ross J. :—

I am of opinion that section 44 of the County Officers and Courts (Ireland) Act, 1877, on which the applicant here grounds his application, refers to Chancery proceedings alone, and that, sitting for the Lord Chancellor, I have no jurisdiction to entertain this application. The jurisdiction, if any, seems to rest with the King's Bench Division (Probate), which can deal with every question relating to the preservation of the assets, except the actual dispute pending before the county court judge. I make no rule on the motion.

Solicitor for the plaintiffs : *C. E. Murphy.*
Solicitor for the defendants : *Robert Dickie.*

T. C. T.

M. R.
1915.
June 10, 11.
July 30.

In re ELLIOT, Deceased.

ELLIOT v. ELLIOT.

Will—Construction—Words of Limitation—Estate in special tail—Gift to a man and the Heirs of his Body other than his Eldest Son.

A testator devised his fee-simple estates to "T.R.B.E. my son and the heirs of his body (other than R.B.E., his eldest son), whom failing to E.C.E., my brother, and the heirs of his body," with a final limitation to the testator's nearest heirs in fee.

Held, that T.R.B.E. took an estate in special tail.

The several kinds of estates tail enumerated in the Statute *De Donis* (33 Edw. 1, c. 1) are not exhaustive, but are given only as examples.

Adjourned Summons.

The testator, Robert Henry Elliot, who was a domiciled Scotchman, was entitled to certain estates in Ireland held in fee-simple, and also to real and personal property in India and in Scotland. He disposed of his Scotch property by a general disposition and settlement, dated the 11th August, 1913. On the 18th September, 1913, he executed two wills, one dealing with his Irish property, and the other with his Indian property. By an instrument in the nature of codicil, dated the 18th September, 1913, and annexed to the settlement of his Scotch property, he declared that his wills dealing with his Irish and Indian property referred to in the said disposition and settlement, as having been executed of even date therewith, had been executed by him of even date with his execution of the said instrument or codicil. The limitations contained in the will dealing with the testator's Irish property were as follows;—"I, Robert Henry Elliot Esquire of Clifton in the County of Roxburgh Scotland hereby give grant assign dispone convey and make over devise legate and bequeath to my wife the Hon. Mistress Anna Maria Louisa Barnewall, or Eliot, in the event of her surviving me in life rent for her life rent use only and to Thomas Robert Barnewall

Eliot my son and the heirs of his body (other than Robert Barnewall Elliot his eldest son), whom failing to Edward Cludde Elliot my brother and the heirs of his body, whom all failing to my own nearest heirs and assignees in fee my lands and estates in the King's County, Ireland, known as the Ballybrittan Estate . . . and all other lands and real or heritable estate in Ireland which may belong to me at the time of my death, and the rents produce and duties thereof, after my death . . ."

The testator died on the 18th August, 1914, his wife having predeceased him. Thomas Robert Barnewall Elliot had three sons, Robert Barnewall Elliot, James Ker Elliot (the defendant), and Thomas William Henry Elliot, of whom Robert Barnewall Elliot had married since the death of the testator. The summons was taken out by the plaintiff, Thomas Robert Barnewall Elliot, for the determination (amongst others) of the following question:—In case the will, dated the 18th September, 1913, of Robert Henry Elliot dealing with his freehold hereditaments is to be construed, and the intention of the testator ascertained according to the principles of the law of Ireland, is the plaintiff under the said will entitled to the said hereditaments in Ireland (*a*) for an estate tail in possession; or (*b*) for an estate for the life only of the plaintiff with remainder in fee simple to the defendant James Ker Elliot, or other the person (not being the plaintiff's eldest son Robert Barnewall Elliot) who shall at the death of the plaintiff be the heir of his body; or (*c*) for an estate for the life only of the plaintiff with a general power of appointment over the fee and inheritance; or (*d*) for some other and what estate?

Jellett K.C. (with him *Longfield*), for the plaintiff, Thomas Robert Barnewall Elliot:—

The testator was a domiciled Scotchman; his will was made in Scotland, and is expressed in technical language of the law of Scotland; to obtain the intention the technical terms must be interpreted by the meaning put on them according to the law of Scotland: *Studd* v. *Cook* (1). The wills dealing with the testator's Scotch and Indian property are in identical terms with

(1) 8 A. C. 577.

M. R. 1915. ELLIOT v. ELLIOT.

this will, in construing which the Court may take them into consideration: *Douglas-Menzies* v. *Umphelby* (1). If the words of the devise, "to Thomas Robert Barnewall Elliot my son and the heirs of his body (other than Robert Barnewall Elliot his eldest son)," are to be construed according to Scotch law, their effect is to constitute the plaintiff an "unlimited fiar," who could deal with the property as absolute owner during his lifetime, but if he should die without having disposed of it in his lifetime, it would go to the heir of his body *per formam doni.*

In the alternative we submit that if the devise is to be construed according to the law of this country (*In re Miller, Bailie* v. *Miller* (2)), the effect is to give to the plaintiff an estate in special tail. Originally a gift to a man "and the heirs of his body" created a conditional fee, when the acquisition of an absolute interest depended only on the birth of issue to the donee. The statute *De Donis* (13 Ed. 1, c. 1) constituted the form of the gift as the test.

As to estates tail special, Preston says (Estates, vol. ii, p. 399): "The different forms of limitation enumerated in the statute are given for example only; and *exempla illustrant non restringunt legem*"; again, at p. 362, citing as examples of estates tail special, the statute of limitation of the Crown on the Princess Sophia and her heirs of her body being Protestants, and a gift to a man and the heirs of his body by a woman of the name of Searle; *Page* v. *Hayward* (3), he says:—"The limitations may be varied in any manner, according to the agreement of the parties": see also p. 412 (where he gives further examples of estates tail special). Bracton, lib. 2, c. 6, quoted in Cruise's Digest, vol i, title ii, p. 67; states the principle thus:—"*Item sicut ampliari possunt haeredes, sicut praedictum est, ita coarctari poterunt per modum donationis, quod omnes haeredes generaliter ad successionem non vocantur. Modus enim legem dat donationi, et modus tenendus est contra jus commune et contra legem, quia modus et conventio vincunt legem,*" which confirms Preston's view that the form of limitations is in the discretion of the donor. In Cruise's Digest, vol. i, title ii, p. 71, it is said:—"In all instances of special entails, which limit the lands to one particular class of heirs, no descendant of the donee can

(1) [1908] A. C. 224.
(2) [1914] 1 Ch. 511.
(3) 2 Salk. 570.

make himself inheritable to such a gift, unless he can deduce his descent through that particular class of heirs to which the succession of the land was limited." The class indicated here is the heirs of the donee's body other than a specified person. The books give various examples of estates tail special in which the eldest son of the donee is cut out from the succession, *e.g.*, estates in tail female, an estate to a man and the heirs of his body by a second marriage, an estate to a man and the heirs of his body *in posterum procreandis*. The last was the form of limitation in *Hebblethwaite* v. *Cartwright* (1), where it was held to create an estate tail; cf.:—*Anon.*, 3 Leonard. 87, referred to in *Doe d. Morgan* v. *Hallett* (2).

Pigot K.C. and *E. M. FitzGerald*, for the defendant, James Ker Elliot:—

The quality of estate claimed by the plaintiff is not a descendible estate such as is known to English law; in creating an estate tail special the lands may be limited to one particular class of heirs, but not to particular members of a class, excluding other members of that class. Coke, Inst., vol. i, 20*b*–26*b* (Hargrave's ed.), enumerates the various species of estates tail special known to the law; the eldest son of the donee can only be excluded by the creation of one of these recognized forms of estate tail special, and not, as is assumed in the argument for the plaintiff, in any way at the discretion of the donor. Nothing in the passages cited from Preston is inconsistent with this view; the only species of estates tail special suggested by him are those where the inheritance is limited to heirs of a particular sex, or by a particular marriage: Preston, Estates, vol. ii, 383–4. Where an estate is created, and one or more of the class of heirs indicated is excluded, that estate cannot be an estate tail; see Preston, Estates, vol. i, 278: "In weighing the force and application of this rule" [the rule in Shelley's case] "the proper inquiries in doubtful cases, in order to the exposition of words of limitation to the heirs, or heirs of the body, &c., are—1st, Whether these words are used to comprehend *all* the persons who shall *successively* answer the description, and consequently shall be words of

(1) Cases *t.* Talbot, 30. (2) 1 M. & S. 154.

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limitation, to enlarge the ancestor's estate; or are words of *purchase*, that is, words describing *particular* persons as *individuals*, to take in their *own right*? 2ndly, What is the legal import of these words, considered as words of *purchase*? and 3rdly, Whether the intention is *manifestly clear*, that the words shall have the *partial effect* of describing *particular* persons, rather than, and in direct exclusion of the construction which would be affixed to them, by allowing them to be affected by this rule; under *which* they will be held to extend to *any heirs* of the given description, *collectively*, as a *class* of persons: *since unless there be such direct intention, plainly and clearly expressed, the rule must take place?*" Again, at p. 282: "From these deductions it will appear that the *previous inquiry* must be, what is the true construction of the limitation to the heirs, or heirs of the body, considered distinct from the freehold in the ancestor. Does it describe all *possible heirs* of the given description; so that it is not confined to *one* person, or to several persons, in whom the character of heirs shall be first fulfilled; or does it by these words, independently of words of super-added limitation, extend to the issue, or the *issue* and other relations of these persons; is the material point to be discovered." See also, on the same point, pp. 294, 322, 326, 349–350, 352–3, 365, 368–9, 376; and *Van Grutten* v. *Foxwell* (1), where Lord Macnaghten said (at p. 667), after quoting the rule in *Shelley's Case* (2): "Every part of that statement is, I think, deserving of attention, from the opening words, which declare the rule to be a 'rule in law,' to the last clause, which says that heirs can never take by purchase in a case to which the rule applies. It is hardly necessary to observe that any expression which imports the whole succession of inheritable blood has the same effect in bringing the rule into operation as the word 'heirs,' though, perhaps, it was not so always (1 Rep. 106 b., n. 1. 5), and though it seems to have been thought at one time, and, indeed, it was argued as late as 1844—*Harrison* v. *Harrison* (3)—that, in the absence of technical words, the governing principle was not the rule in *Shelley's Case* (2), but the doctrine of cy-près." Once the

(1) [1897] A. C. 658.
(2) 1 Rep. 104 *a*.
(3) 7 Man. & G. 938.

donor selects from the class of persons who could form the body of heirs special, the selected persons take as *personae designatae*: *Van Grutten* v. *Foxwell* (1).

In *Hebblethwaite* v. *Cartwright* (2) the eldest son of Charles Hebblethwaite was not cut out of the inheritance by the limitation "to Charles Hebblethwaite for life, and after his decease to the heirs male of his body hereafter to be begotten," for the Lord Chancellor's opinion was "that Charles took an estate tail: and that the words, 'hereafter to be begotten,' do not confine it to the issue born after, but will likewise take in that born before." Similarly, in *Doe d. Morgan* v. *Hallett* (3), a son born before the date of the will was held to be entitled, under a limitation to "the first and other sons of Sir Thomas Head, lawfully to be begotten, and the heirs male of the body of such first and other sons." In the case in 3 Leonard 87 the third son took as *persona designata*, and the judgment speaks of a "speciall inheritance," which is not the same as an estate tail special.

It is true that Coke (Inst. 22*a*) mentions as "of all the estates taile most coarcted or restrained, that I find in our bookes, the estate taile in 39 Ass., pl. 20, where lands were given to a man and to his wife and to one heire of their bodies lawfully begotten, and to one heire of the body of that heire only." But he goes on: "This case being adjudged n the point is an exception (some say) out of the general rule put before by Littleton, sect. 13, that all estates taile were fee simple at the common law; for (say they) by this limitation (*haeredi*) in the singular number the donees had not had a fee simple at the common law"; and Perkins (par. 171) doubts whether an estate tail could be created by those words.

The defendant is either entitled in fee simple as *persona designata*, or he takes as purchaser under a special form of limitation other than an estate tail. The character of the estate created by these words is described by Preston, Estates, vol. i, p. 280: "The observations on a limitation to the right heirs of a person, as purchasers, are equally applicable to a limitation to the heirs of his body, as purchasers, with this distinction; though the

(1) [1897] A. C. 658.
(2) Cases *t.* Talbot 30.
(3) 1 M. & S. 124.

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limitation will vest *all the estate* imported by these words in the person, who *first* fulfils the character of *heir, according to the terms of the gift*, yet it does not exclude those persons who, by any possible event, may, at a future period, bring themselves within the same description." Such an estate, he says, "vests *wholly* in the first taker with a *descendible*, or, more accurately speaking, a *transmissible* quality." The words "heirs of the body" may be used as signifying a certain individual: *Birchett* v. *Durdant* (1). Here the first limitation is to certain members of a class, but the gift over ("whom failing to Edward Cludde Elliot my brother and the heirs of his body") is a limitation of an estate tail in the ordinary form, so that the words "heirs of the body" must be read differently in the two passages: *Ridgeway* v. *Munkitterick* (2). [They also referred to Burton, Real Property (8th ed.), p. 207; Preston's Watkins (3rd ed.), pp. 56–58; Cruise's Digest, vol. i, p. 70; Williams, Real Property (17th ed.), p. 84; Tomlin's Law Dictionary, tit. Tail.]

Longfield, in reply:—

Preston (Estates, vol. ii, p. 421) says: "A gift to a man and his heirs begotten by his son exhibits another instance of an estate tail special as to the person from whom the issue inheritable to the estates are to proceed." [*Pigot K.C.*—Coke says of that example only that "it is holden by some opinions" (Inst. 20*b*).] If it is held that the words "heirs of the body" in this devise must bear their technical meaning, the Court would be justified in rejecting words inconsistent with the ordinary incidents of an estate tail: *Van Grutten* v. *Foxwell* (3); Jarman on Wills (1910 ed.), p. 1899.

Cur. adv. vult.

July 30. O'CONNOR M.R.:—

In this case we have to construe the will of Robert Henry Elliot, late of Clifton, in the County of Roxburgh, Scotland. The testator was a domiciled Scotchman, but although the language of the will is in Scottish form, it is appropriate for the devise of lands in Ireland, and may therefore be dealt with as if it were a will made by a domiciled Irishman.

(1) 2 Ventr. 311.
(2) 1 Dr. & W. 84.
(3) [1897] A. C. 658.

The devise with which we are concerned is as follows:—

"I, Robert Henry Elliot, Esquire, of Clifton, in the County of Roxburgh, Scotland, hereby give grant assign dispone convey and make over devise legate and bequeath to my wife the Honourable Mistress Anna Maria Louisa Barnewall or Elliot in the event of her surviving me in life rent for her life rent use only and to Thomas Robert Barnewall Elliot my son and the heirs of his body (other than Robert Barnewall Elliot his eldest son) whom failing to Edward Cludde Elliot, my brother and the heirs of his body whom all failing to my own nearest heirs and assignees in fee my lands and estates in King's County Ireland known as the Ballybrittan Estate including therein all the lands and heritages in that County to which I succeeded under and by virtue of the last will of the deceased Right Honourable Thomas Baron Trimleston of Trimleston Castle in the Kingdom of Ireland father of my said wife dated 9th July, 1876, so far as still belonging to me and all other lands and real or heritable estate in Ireland which may belong to me at the time of my death and the rents produce and duties thereof after my death . . ."

The estate given to the testator's widow is a life estate only. There can be no question about that. The next estate is to Thomas Robert B. Elliot and the heirs of his body. These words taken by themselves give an estate in tail general. This, too, is certain. But then follow the words in brackets, "other than Robert Barnewall Elliot his eldest son." It is this exception which creates the difficulty. The eldest son is excluded. The lines of devolution are, in the first place, to the second son, and next to the third, and so on. It is contended that there is no such estate tail known to the law as an estate limited to a man and the heirs of his body other than the eldest son.

It is certainly a very unusual limitation, if not unprecedented. Indeed the researches of counsel or my own did not result in the discovery of such an estate tail.

One proposition, however, seems to have been accepted by the text writers, viz.: that the several kinds of estates tail enumerated in the statute *De Donis* are not exhaustive, and are only examples. We find in Coke 21 *b*: "That the cases of the statute are set down but for examples of estates tail, generall and speciall, and

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not to exclude other estates tail." This is adopted by the later text writers (see Preston on Estates 375, ed. 1827; Cruise's Digest. Tit. Estate Tail, ch. 1, sec. 22).

Why then should we not have one more example of an estate tail, such as that now given, even though it should be given for the first time? Under the statute, "the will of the giver according to the form in the Deed of Gift manifestly expressed should be observed." Why should not the intention of the testator, manifestly expressed, that the eldest son should be passed over, prevail? There are well-known examples of estates in tail special where the eldest son is cut out. A man may have an only son by a first marriage, and may have on his second marriage an estate settled on him and the heirs of his body by his second wife. This would certainly be a valid estate tail, although it could not devolve on the eldest son of the grantee. So, too, an estate tail may be given to a man and the heirs female of his body, thus cutting out not merely his eldest, but all his sons, according to the form of the gift.

Mr. Jellett referred to the anonymous case in 3 Leonard 87 in which A. made a feoffment to the use of his younger son in tail, and after to the use of the heirs of his body *in posterum procreandis*. At the time of the feoffment A. had two sons, and, after the feoffment, he had issue a third son. The younger son died without issue, and it was held that the land went to the third son born after the feoffment. Here again the eldest son was cut out.

Cases like those I have quoted afford ample authority for the general proposition to be found in Preston on Estates, vol. ii, p. 375:—"Although heirs of the body take by descent, it is not necessary they should be the actual heirs; one person may be the common law heir, and another person be the heir under the entail, and different estates tail may descend in different lines, and to different persons as heirs . . . It is sufficient that he be heir according to the form of the gift."

An example of the peculiar forms an estate tail may take is given by Coke 20 *b*. There it is said:—"It is holden by some opinions that if there be grandfather, father, and sonne, and lands are given to the grandfather and to his heirs begotten by the father, the father dyeth, the grandfather dyeth, the sonne is in as heire to the grandfather begotten upon the body of his father,

and the wife of the grandfather in that case shall be endowed." Preston gives this as an example of an estate tail passing over a degree. If such a capricious limitation is allowable, there ought not to be much difficulty in the way of holding that an estate tail may be limited so as to pass over an eldest son.

The gift of every estate tail takes effect *per formam doni*, and Coke says—"Of this estate taile it is said: *Modus legem dat donationi & tenenda est etiam conventio, quia modus et conventio vincunt legem.*"

Once it appears that an estate tail is given by the will in the present case, all difficulty is got rid of.

I must express my acknowledgment of the researches made by counsel for the purposes of the argument, and the great ability displayed by both sides.

Solicitors for the plaintiff: *Moore, Keily, & Lloyd.*
Solicitors for the defendant: *D. & T. Fitzgerald.*

A. H. W.

Madden J.
1915.
June 14, 21.
Nov. 15.

IN RE MICHAEL WALSH.

Land Registry—Local Registration of Title (Ireland) Act, 1891, (54 & 55 *Vict. c.* 66), *sect.* 34 (2)—*Rectification of Register—Powers of Land Judge.*

The Court has power under the 34th section of the Local Registration of Title (Ireland) Act, 1891 (1), to decide, as between the parties to any instrument or transaction registered, any question which may arise as to its construction or effect, and to rectify any error which may have occurred in the course of registration, if such error can be corrected without injuriously affecting any person who is not a party to the instrument or transaction.

Statement of the protections provided by the Act for persons whose interests may be affected under a system of land registry with conclusive title.

MOTION by Peter Keogh that folio No. 3155 of the Register, County of Wicklow, and the map lodged therewith, be amended by omitting therefrom the holding of Peter Keogh.

Michael Walsh, the registered owner, on the 25th March, 1906, signed an agreement with his landlord, the Earl of

(1) 54 & 55 Vict. c. 66, sect. 34: "(1) The register shall be conclusive evidence of the title of the owner to the land as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any Court of competent jurisdiction based on the ground of actual fraud or mistake, and any such Court may, upon such ground, make an order directing the register to be rectified in such manner and on such terms as it thinks just.

"(2) Where any error occurs in the registration of the ownership of land (whether of mistatement, misdescription, omission, or otherwise, and whether in the register or in any map attached thereto), the Court, upon such application, and in such manner as may be prescribed, and after such notice, if any, as it may direct, may, if in the opinion of the Court such error can be corrected without injury to any person, order such error to be corrected upon such terms as to costs or otherwise, as it may think fit; and, thereupon, the registering authority shall rectify the register in such manner as may be necessary to give effect to the order" . . .

Carysfort, for the purchase of a holding consisting of 3R. 10P. of the lands of Ballinvally Upper, County Wicklow. The second schedule to the agreement contained a statement that there was not any person in occupation of the said holding as under-tenant or otherwise. The sale was carried out, and the holding was vested in Michael Walsh by fiat of the Irish Land Commission, dated the 22nd May, 1913. On the 15th December, 1913, Michael Walsh was registered on Folio No. 3155 of the Register, County Wicklow, as owner of the said lands in fee simple, the only burden mentioned on the register being the purchase-annuity payable to the Irish Land Commission. It appeared, however, that there was on the holding of Michael Walsh a second cottage and a yard, which had been for many years in the possession of Peter Keogh and his predecessors as weekly tenants to the Earl of Carysfort. The applicant's father had lived in this cottage, as also had his mother until her death in 1905, after which it was sub-let by the applicant to a tenant. Two letting agreements of this cottage and yard were produced, one, dated the 30th April, 1908, between Peter Keogh and the Earl of Carysfort, the other, dated the 24th April, 1911, between Peter Keogh and Colonel Proby (the successor in title of the Earl of Carysfort). It had not been intended to include this plot in Walsh's holding on the occasion of the sale, but by mistake it was not excluded from the map. The mistake was not discovered until after the vesting of the holding in Michael Walsh, and in the meantime Keogh had been paying rent to the Earl of Carysfort and, after his death, to Colonel Proby, but on the 4th May, 1914, Colonel Proby's agent wrote to Walsh enclosing a cheque for £3 1*s.* 2*d.*, "being rent paid by Keogh for the period between the signing of your purchase agreement and the vesting order." On the 9th May, 1914, Michael Walsh served on Keogh a notice to quit "the cottage, yard and garden held by you as tenant from week to week under an agreement dated the 24th April, 1911, and made between Colonel Douglas James Proby of the one part and Peter Keogh of the other part." The notice stated that "The interest of the said Colonel Douglas James Proby in the aforesaid cottage, yard and garden, and in the aforesaid agreement, is now vested in me, Michael Walsh." The notice to quit not being

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complied with, Walsh, on the 6th June, 1914, issued a civil-bill ejectment for overholding against Keogh, which came on for hearing on the 2nd October, 1914, and was adjourned in order that the present proceedings, to have the register and map amended, might be instituted.

Swayne, for the applicant, Peter Keogh :—

The case comes within the provisions of sect. 34, sub-sect. 2, of the Local Registration of Title (Ireland) Act, 1891, for the register can be amended "without injury" to Walsh. "Injury" in that section means depriving a man of some right of which, but for the section, he would not be deprived. Here, apart from the section, Walsh could be deprived of this plot. Further, it is submitted, that "without injury to any person" in sect. 34, sub-sect. 2, means "without injury to any third person." In *Leonard's Estate* (1) the register could not have been amended without injury to a person who was not a party to the agreement between Chambers and the Estates Commissioners. *Wilson's Estate* (2) is distinguishable, for there the vendor had purported to sell the land in dispute, while, in the present case, so far from selling Keogh's plot, he got him to sign a new agreement and received rent from him subsequent to the signing of Walsh's purchase-agreement.

Lupton, for Michael Walsh :—

Even if Walsh only intended to purchase the land of which he was himself in occupation, the landlord has recognized him as owner of the whole, and refunded to him the rent received from Keogh since the signing of the purchase-agreement. In any event Keogh will not be injured, as he will be a weekly tenant either to Walsh or to Colonel Proby. [He referred to *Leonard's Estate* (1) ; *Wilson's Estate* (2) ; *Hussey's Estate* (3).]

Nov. 15. *Cur. adv. vult.*

MADDEN J. :—

Prior to the year 1906, Michael Walsh was tenant of certain lands the property of the Earl of Carysfort, at the weekly rent

(1) [1912] 1 I. R. 212.
(2) 42 I. L. T. R. 123.
(3) [1912] 1 I. R. 473.

of one shilling. On the 25th March, 1906, Walsh entered into an agreement with his landland for the purchase of his holding, described as containing 3R. 10P. and in the occupation of the tenant. The agreement contained a statement that there was not any other person in occupation of the holding, as tenant or otherwise.

The agreement was carried into effect, and Michael Walsh is now the registered owner of the holding, which is described in the map which is the subject of the present application. It has been proved, as a matter of fact, that the map filed with the folio in the Land Registry Office includes, in addition to the 3R. 10P. of which Walsh was the occupier, a small parcel of land, of which Walsh was not in occupation and which was therefore not included in the agreement for sale. I am satisfied that this parcel of land was legally in the possession of one Peter Keogh, although it was not actually occupied by him at the date of the sale. It has been clearly established that the agreement for sale did not include this parcel of ground. This appears from the terms of the agreement, and also from the evidence of Mr. Roper, who carried out the sale. Furthermore, I believe the evidence of Mr. O'Reilly, who stated that he attended at Wicklow Quarter Sessions when this matter was under consideration, and that in cross-examining Michael Walsh he asked him whether when he signed the agreement for sale he believed that he was purchasing Peter Keogh's holding as well as his own, that Walsh replied that he did not, and added that he first thought that he had acquired Keogh's holding when he was told in the office that it was included in his purchase. If it were necessary for me to decide the point, I should hold that there is not, and never was, any real or bona fide claim on the part of Walsh to Keogh's holding, and that the case that he now puts forward is an after-thought founded on the mistake which he discovered in the map. But I do not rest my decision on this point, which is not material, having regard to the opinion which I entertain on the question of the jurisdiction vested in this Court under the statute.

The application before me is by Peter Keogh, who asks to have the map amended by excluding from it the parcel of land of which Walsh was not in occupation, which he claims as his property.

By the 34th section of the Local Registration of Title Act, 1891,

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the register is declared to be conclusive evidence of the title of the owner to the land as appearing thereon, and if there were nothing more in the Act, Walsh's title to the land would be conclusive and unassailable.

It is of the essence of a system of registration of title, as distinguished from one of registration of deeds, that the register should be conclusive evidence of ownership. But it is evident that the establishment of a system of registration of title, conclusive as to ownership, and, to a great extent, compulsory, necessitated the introduction of provisions for the recognition and subsequent first registration of pre-existing charges or estates, and also for protection against such errors and mistakes as might occur in carrying out the work of registration. It was also necessary to keep alive as against registered land any rights which might exist in any person to have recourse to a competent tribunal to set aside or rectify contracts on the ground of actual fraud or common mistake.

The Irish system of land registration has been in operation for more than twenty-four years. Up to the end of the year 1914, 242,000 folios were opened, and the total number of transactions of all kinds affecting registered land carried through the Land Registry Office in the year 1914 exceeded 17,500.

The register cannot be rectified except by order of the Court. The number of applications to my predecessor and to myself to correct errors in the register has been small, having regard to the number of transactions, but they must necessarily increase in number with the development of the system, and the present case affords an opportunity of considering the jurisdiction vested in the Court for this purpose by the statute, in view of decided cases. The case before me is concerned with the powers vested in this Court for the purpose of correcting errors in the register. But the extent and limitations of this jurisdiction can be best apprehended when they are viewed in relation to the statutory provisions for the protection of the public under a system of registration with conclusive title regarded as a whole.

(1) The 34th section of the Act, by which the register is made conclusive evidence of title, proceeds to enact that the title of the registered owner shall not, in the absence of actual fraud,

be affected in consequence of the owner having notice of any deed, document, or matter, relating to the land. The equitable doctrine of notice, the application of which to the case of registered deeds, though perhaps inevitable, was the great weakness of that system, in its origin was founded on fraud. It was regarded as fraudulent and dishonest for a man to set up a title to land which he knew to be bad, and a Court of equity would not permit him to do so. But the doctrine in its development outgrew its original proportions. Eminent equity lawyers have regretted the introduction into our jurisprudence of the principles of constructive and imputed notice in regard to registered deeds. This increased the infirmity of the system of the Registration of Deeds. It was plainly inconsistent with a system of Registration of Title. Accordingly, it was swept away by the 34th section of the Act, and replaced by the principle of relief against fraud in which it had its origin. The section leaves it open to a Court of competent jurisdiction, in substantive proceedings, to deal with a registered title on the ground of actual fraud, in such manner as it thinks just, and to order the register to be rectified accordingly. It contains a similar provision applicable to a case where the instrument registered can be rectified on the ground of common mistake, by substantive proceedings in a Court of competent jurisdiction. In both these cases the rectification of the register is made under the order, not of this Court, but of the Court by which the case is heard.

(2) The interests of the tenants purchasing their holdings under the Land Acts were, in many instances, subject to charges and interests of various kinds created prior to the purchase of the fee-simple of the holding. The policy of the Land Acts, supplemented by the Local Registration of Title Act, was to vest in the purchasing tenant an absolute estate in fee-simple, and to place him in this position on the register of title. In carrying out this policy it was necessary to afford protection to the owners of the estates and charges which had been created during the currency of the tenancy. This could have been done in either of two ways. The duty might have been imposed on the registering authority, prior to registration, of ascertaining and entering on the register, as burdens, the antecedently created

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charges and interests. This process, which would have been in many instances a difficult and protracted one, would have indefinitely postponed the establishment throughout Ireland of a general register. The alternative course was adopted of permitting registration to be effected with a note on the register that it was to be subject to rights and equities arising from the interest vested in the purchaser being deemed to be a graft on his previous interest. Provision is made for the cancelling of this note on the application of the registered owner, and it is satisfactory to note that this temporary but needful blot on the system is being gradually removed. The protection afforded in this instance is not by rectification of the register, but by keeping it open for ultimate completion by the entry of all the transactions relating to the title to the land registered.

(3) I proceed to consider the provisions for the protection of the public, with which the present case is immediately concerned, by which this Court is given power to correct errors or mistakes which have occurred in course of registration. These are contained in the 34th section of the Act, which enacts: "Where any error occurs in the registration of the ownership of land (whether of misstatement, misdescription, omission or otherwise, or whether in the register or any map attached thereto), the Court, upon such application and in such manner as may be prescribed and after such notice, if any, as it may direct, may, if in the opinion of the Court such error can be corrected without injury to any person, order such error to be corrected upon such terms as to costs or otherwise as it may think fit."

The map in the Land Registry is not conclusive as to boundaries, except in the cases provided for by sect. 57 of the Act, and by Order IX, Rule 3. But it is an essential part of the register, and its rectification is provided for by the 34th section. The present case is conversant with an error in the map.

In order to decide whether a transaction has been accurately represented on the register, it is necessary in the first place to decide what the transaction is. This is sometimes a question of law, as when a deed or will is the subject of registration, and it is alleged that a mistake has been made as to the nature of the estate created or conveyed. In other cases the mistake alleged to

exist is one of fact, as in the present case where, in the registration of a transaction dealing with the lands in the occupation of Michael Walsh, it is alleged that some land has been included, of which Michael Walsh was not in occupation. In such a case the Court must find as a fact what were the lands in occupation of Walsh, and if it finds that the register or map includes other lands, correct it by the exclusion of the lands which were not the subject of the transaction registered. As between the parties to the contract or transaction brought to the registry, I am of opinion that the Court has jurisdiction to decide all questions, whether of fact or of law, which are necessary to be decided in order to bring the register into conformity with the contract or transaction to which they are parties. This seems to me necessarily to involve the power to decide as to the nature and effect of the instrument or transaction in the registration of which an error is alleged to have occurred.

In an application like the present one, the Court may come to the conclusion that the map for registering includes something outside the transaction to be registered. By amending the map in accordance with the contract for sale, no person other than the parties to the contract is injuriously affected. Or the Court may come to the conclusion that the contract for sale included some lands that have been by mistake omitted from the map. Here comes into operation the restriction on the power and jurisdiction of the Court contained in the section from which I have quoted. The error in the map can only be corrected, if, in the opinion of the Court, this can be done without injury to any person. By these words I understand, any person other than the parties to the transaction brought into the registry for registration, in regard to whom the Court has jurisdiction to decide upon the contract, in order to ascertain whether any error has taken place in the process of registration. In the case which I have last supposed, an error has occurred, but, without the consent of the owner of the lands erroneously excluded from the register, it cannot be corrected by the Court, and if the error could not be set right by substantive proceedings in a Court of competent jurisdiction, the question would then arise whether a remedy is afforded by means of the system of insurance to which I shall refer.

Madden J. 1915.

In re WALSH.

The limitation on the exercise by this Court of the power to correct errors in the course of registration, which was imposed by the 34th section, was considered by the Court of Appeal in three cases.

In *Leonard's Estate* (1) the registered agreement contained a clause by which a right of way was reserved for the owners and occupiers for the time being of holdings in lands adjoining the purchased lands. The purchaser applied to the Court that the agreement should be amended by striking out this clause, on the ground that it was introduced by mistake. The persons entitled to this right of way were not parties to the agreement for sale. The Court of Appeal held that this Court had no power under the 34th section, as against these persons, to amend the registered agreement, even if it were satisfied that the clause in question had been introduced into the agreement by mistake. The effect of this section is thus stated by the Lord Chief Justice, then Lord Justice of Appeal, at page 229:—"The jurisdiction conferred by the 34th section of the Local Registration of Title Act to correct an 'error' in the registration only exists where such error can be corrected 'without injury to any person.' I do not think these words can be interpreted as meaning 'without *injustice* to any person.' I think that they mean 'without disturbing, whether justly or unjustly, existing legal rights.' Sub-section 2 was manifestly intended, in my opinion, to provide for cases where some clerical error or misdescription of a character not affecting the rights of third parties had crept into the register; but it was clearly not intended for a case of the kind now before us, where a fierce legal contest exists between one of the parties to the agreement and another purchaser, and the correction sought to be made is for the purpose of the dispute."

The class of errors referred to by the Lord Chief Justice are clerical errors. They are of the class most likely to occur, and, to the best of my recollection, the cases in which I have directed the rectification of the register have all been of this kind. But the distinction taken is not between clerical errors and others of a more substantial character, but between errors and misdescriptions,

(1) [1912] 1 I. R. 212.

affecting the parties to the registered agreement and those affecting the rights of third parties. In regard to errors of the latter class the Court is powerless where the rectification would cause injury to a third party in the sense in which the word "injury" is interpreted by the Lord Chief Justice.

This case and another to the same effect, *In re Wilson's Estate* (1), came under the consideration of the Court of Appeal in *Hussey's Estate* (2). Referring to these decisions, the Lord Chief Justice says:—"What was then determined was that this sub-section (2) was not applicable to cases in which there were contested rights between tenant-purchasers and third parties."

Some passages in the judgments of Lord Justice Holmes in these cases would seem to suggest a further limitation on the jurisdiction conferred on the Land Judge to correct errors in the register. But these observations had no direct bearing on the decisions of the Court, the ground of which has been clearly defined in the judgment in *Hussey's Estate* (2), from which I have quoted.

I am of opinion that this Court has jurisdiction under the 34th section, where it is alleged that an error has occurred in the registration of any instrument or transaction, to decide, as between the parties to the instrument or document, any question of law or fact which may arise as to its construction or effect, subject to review by the Court of Appeal, and then by rectification of the register to bring it into conformity with the instrument or transaction which is the subject of registration, subject to this limitation, that the power so conferred can only be exercised when the error can be corrected without injury to any person other than the parties to the instrument or transaction which is put on the register.

(4). It is plain from the foregoing statement of the law that errors might occur in the course of registration which could not be rectified under the powers conferred upon this Court under the 34th section, and, following the example of Colonial registers of title, an insurance fund was created for the purpose of

(1) 42 I. L. T. R. 122. (2) [1912] 1 I. R. 473.

Madden J. 1915. *In re* WALSH.

indemnifying persons from loss incurred as owner, incumbrancer, or otherwise, on first registration, or in subsequent transactions, where an entry was obtained by forgery or fraud, or made by any error on the part of the registering authority or any of his officers. This fund is maintained by a small annual deduction from the total fees received in the Land Registry.

The absence of such a provision in connexion with the conclusive conveyancing established under the Landed Estates Court Act, and its predecessor, led to the unfortunate results recorded in the decisions of the House of Lords in *Rooke* v. *Errington* (1) and *Power* v. *Reeves* (2).

Having regard to the number of years during which the Land Registry has been in operation, and the number of transactions carried through the office during those years, it is interesting to note that in all these years the insurance fund has been resorted to in two instances only. In one case an amount of £150 was paid in respect of the non-registration of a judgment mortgage, the validity of which, though allowed by the Court, was very disputable. In the other case, a sum of £20 was paid in consequence of the accidental omission of a legacy from a number that were being entered on the register.

The error in the present case is one which can, in my opinion, be rectified without injury to any person who is not a party to the registered transaction, and I make an order in accordance with the notice of motion.

Solicitors for the applicant: *Terence O'Reilly & Sons.*
Solicitor for Michael Walsh: *George F. Fleming.*

A. H. W.

(1) 7 H. L. C. 617. (2) 10 H. L. C. 645.

IN THE MATTER OF THE ESTATE OF GEORGE ROBERT CONBOY.

Wylie J.
1915.
Nov. 29.
Dec. 7.

Will—Construction—Devise to A *in fee simple, but, in the event of* A *having no "heirs or issue," over to* B *upon* A's *death—Nature of Estate taken by* A—*Wills Act* (1 *Vict. c.* 26), *s.* 29.

A will, made in 1877, contained a devise, in effect, to A in fee simple, but, in the event of A having no heir or issue, over to B, a nephew of A, upon A's death.

Held, that sect. 29 of the Wills Act did not apply; that the same construction must be put upon the devise as would be put upon a devise to A in fee simple, but, in the event of his having no heir of his body, or issue at his death, then over to B in fee, and, accordingly, that A took an estate in fee simple, subject to a contingent executory devise over on his death.

In re John Sallery (11 Ir. Ch. R. 236) considered.

QUESTION arising on the allocation of the residue of the purchase-money of the lands sold in this matter.

At the date of his death, hereafter mentioned, William Conboy was seised of an estate in fee simple in possession in (*inter alia*) the lands of Shancough in County Sligo.

By his will, dated the 14th June, 1877, the said William Conboy gave to his son, Thomas Henry Conboy, his interest in certain lands therein mentioned, and also in the lands of Annaghcarty and Drumsena, situated in County Sligo, subject as to the last-mentioned lands to an annuity to testator's wife, and gave to his son, George Robert Conboy, his interest in certain lands situated in County Leitrim, and also in the said lands of Shancough, subject as to the last-mentioned lands to an annuity to Isabella Conboy; and after leaving certain lands to his wife, and appointing her guardian of the lands and property left to George Robert Conboy, and also of himself until he should attain twenty-one, and bequeathing certain pecuniary legacies, testator provided as follows:—"I also hereby will and direct that, in case my said son, Thomas Henry Conboy, shall have no heir or issue, the said lands of Annaghcarty and Drumsena, herein bequeathed

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to him, shall, in such case, go to the eldest son of the said George Robert Conboy, after the death of the said Thomas Henry Conboy. I also will and direct, in like manner, that, in the event of my son, George Robert Conboy, having no heir or issue, the said lands of Shancough herein devised to him shall, in such case, go to the eldest son of Thomas Henry Conboy after the death of George Robert Conboy. In the event of neither sons, Thomas Henry Conboy and George Robert Conboy, having neither heir nor issue, the said lands above named shall be divided in equal parts among my three daughters."

The testator died on the 29th July, 1878, and thereupon his son, George Robert Conboy, entered into possession of (*inter alia*) the lands of Shancough, and had now sold them under the Land Purchase Acts. On the 25th March, 1914, the vendor executed a disentailing deed.

The question now arose as to whether the vendor took an estate tail in the said lands under the said will, or was entitled to an estate in fee simple with an executory limitation over in the event of his dying without issue?

The person who would be entitled on the latter view in that contingency was his nephew, William H. Conboy, who was resident in New York. He had been served, but did not appear.

Fetherstonhaugh K.C., for the vendor.

If the words were simply "without issue," section 29 of the Wills Act would apply, and there would be a good contingent executory gift over. If, on the other hand, the words were "without heirs," the vendor would have taken an estate tail, and, as he has disentailed, would now be entitled to the residue: See *Kirkpatrick* v. *King* (1): *In re John Sallery* (2); *Dawson* v. *Small* (3). It is submitted that the addition of the word "heirs" excludes section 29, and accordingly that the vendor took an estate tail.

Cur. adv. vult.

(1) 32 I. L. T. R. 41.
(2) 11 Ir. Ch. R. 236.
(3) L. R. 9 Ch. App. 651.

Wylie J.
1915.

In re CONBOY'S ESTATE.

Dec 7.

WYLIE J.:—

The question raised is whether the vendor, George Robert Conboy, took under his father's will an estate tail in the lands sold or an estate in fee with an executory devise over.

Testator made his will in June, 1877, and died in July, 1878. In order to get a clear view of the scope and effect of the will, I think it is necessary to refer not only to the dispositions in favour of George R. Conboy, but to those in favour of his brother, Thomas Henry Conboy. Testator leaves to his son, Thomas Henry Conboy, his interest in two sets of lands, subject as to the second set to an annuity to testator's wife. Then he leaves to his son, George Robert Conboy, his interest in two other sets of land, subject as to the second set to an annuity to Isabella Conboy. He then leaves certain lands to his wife, appoints her guardian of the lands and property left to George Robert Conboy, and also of himself, till he should attain twenty-one, and bequeathes a number of pecuniary legacies. Now if the will had stopped there, there can be no question that both Thomas Henry and George would have taken under it the fee simple in all the lands respectively devised to them. But then the will proceeds as follows:—"I also hereby will and direct that, in case my said son, Thomas Henry Conboy, shall have no heir or issue, the said lands of Annaghcarty and Drumsena [the second set of lands] herein bequeathed to him shall, in such case, go to the eldest son of the said George Robert Conboy after the death of said Thomas Henry Conboy. I also will and direct, in like manner, that, in the event of my son George Robert Conboy having no heir or issue, the said lands of Shancough [the second set of lands] herein devised to him shall, in such case, go to the eldest son of Thomas Henry Conboy after the death of George Robert Conboy. In the event of neither sons, Thomas Henry Conboy and George Robert Conboy, having neither heir nor issue, said lands above-named shall be divided in equal parts amongst my three daughters." Now, as I have already said, the two devisees, Thomas and George, would, I think, under the old law, and certainly by virtue of section 28 of the Wills Act, take, under the previous part of this will, the fee simple in all the

Wylie J. 1915.

In re Conroy's Estate.

lands devised to them, unless there is something else in the will showing a contrary intention. There is nothing else whatever affecting the first set of lands devised to each, and, therefore, they take the fee-simple in these lands. Why the gift over is applied only to the second set of lands in each case it is impossible even to guess. But there it is, and the question is whether and how far it has the effect of modifying or cutting down the estate which would otherwise be given by the previous clauses? There are three gifts over in the portion of the will that I have read, and there is a slight difference in the mode of expressing the event upon which they are to take effect. In the case of Thomas it is expressed thus:—"in case my said son, Thomas Henry Conboy, shall have no heir or issue"; in the case of George thus:—"in the event of my son, George Robert Conboy, having no heir or issue"; and in the case of both thus:—"in the event of neither sons having neither heir nor issue." All three, however, must plainly have the same meaning, and I venture to say that no person other than a lawyer could entertain the slightest doubt as to the meaning the testator intended them to have.

I feel no doubt myself that testator meant that if Thomas had at his death no son, daughter, or other issue, to whom he could leave the lands, they were to go to the eldest son of George; that if George had at his death no son, daughter, or other issue, to whom he could leave the lands, they were to go to the eldest son of Thomas; and that, if both these events happened, the lands of both Thomas and George were to be divided between their three sisters named in the will. But I am not at liberty to construe a will according to the view of the man in the street, however intelligent it might be, but must approach the construction of it as a lawyer, paying due regard to any legal terms of art that testator may have used, and to the statute and case law affecting wills.

Now, if the word "heir" had not been used in those clauses, but only the word "issue," no question could have been raised, because section 29 of the Wills Act would admittedly apply, and prevent the implication of an estate tail. But the word "heir" being used, it must be dealt with and construed according to its

legal meaning, having regard to the context. The exact words to be construed are, "in the event of George Robert Conroy having no heir or issue," the lands given to him are in such case to go to the eldest son of Thomas after the death of George, and some effect must be given to every word in that clause if possible. Now, inasmuch as the eldest son of Thomas would be a collateral heir of George, the word "heir" in this clause cannot mean heir in general, but must mean and be read as "heir of the body." The first question, therefore, is whether the use of the words, "heir of the body," in this clause, in conjunction with the word "issue" prevents section 29 from applying to the case.

In *Kirkpatrick* v. *King* (1), where leaseholds were bequeathed to two persons in terms that would pass the entire interest, and there was a gift over in the event of the legatees "dying without heirs," the Court of Appeal held (*a*) that, in the circumstances of the case, "heirs" must be read "heirs of the body," and (*b*) that, as the words "heirs of the body" were not mentioned in section 29 of the Wills Act, that section did not apply, and that the legatee or devisee must, therefore, in accordance with the old law, take an estate tail by implication in realty, and an absolute interest in personalty. In *Dawson* v. *Small* (2), where real and personal estate were given by will to J. S. L., and the heirs male of his body, but in case of the death of J. S. L. without heirs male of his body, over, it was held that section 29 had no application. In *In re John Sallery* (3), a testator left to his illegitimate son, R. S., certain leaseholds, and, if R. S. should die without heirs or issue, over, the word "heirs" there necessarily meaning "heirs of the body." Dobbs J. held that section 29 did not apply, though in that case, as in this, the words "or issue" were also used, and that R. S. would have taken an estate tail in realty, and, therefore, he took an absolute interest in the leaseholds. That is the case most like the present, and, therefore, so far as the decision is applicable to the present case, I feel bound by it. I, therefore, assume, in further dealing with the case, that where, in a will since the Wills Act, there is a gift over in the event of a devisee of real estate dying without "heirs of the body," either with or

(1) 32 I. L. T. R. 41.
(2) L. R. 9 Ch. 651.
(3) 11 Ir. Ch. R. 236.

Wylie J., 1915. *In re* CONROY'S ESTATE.

without the addition of the words "or issue," section 29 does not apply, and the devisee would by implication take an estate tail, in accordance with the old law, unless there is something else in the will to show a contrary intention.

Now, let us examine more closely the material provisions of this will in the light of the old law, and apart from section 29 of the Wills Act. The words used in this will are certainly unique. I have not been referred to any case at all like it, and I have not found any. The effect of the will may, I think, be shortly stated thus:— Devise to A. in fee simple, but in case A. has no heir of his body, or issue, over to B. upon A.'s death; or, according to the other words used, devise to A. in fee simple, but, in the event of A. having no heir of his body, or issue, over to B. on A.'s death. I confess I cannot understand what was in the testator's mind when he used the words "heir of the body, or issue," because any issue would be an heir of his body, unless he thought the word "heir" was the proper mode of referring to male as distinguished from female issue, or used the word "issue," to explain what he meant by an "heir." Whatever he may have meant, however, I think it is clear from the words "after the death of Thomas," and "after the death of George," that he intended each gift over to take effect, if it took effect at all, at the death of the devisee, and, as a man cannot have an heir, or heir of his body, during his life, the death of the devisee is also the time at which it must be ascertained whether he has an heir or not. Therefore, it seems to me that, in order to give effect to all the words used, this will must receive the same construction as would be put upon a devise "to A. in fee simple, but in the event of his having no heir of his body, or issue, at his death, then over to B. in fee," and I think there can be no question that, under a devise in these terms, A. would, according to the law prior to the Wills Act, have taken an estate in fee simple, subject to a contingent executory devise over on his death, and not an estate tail.

I am glad I have felt compelled to decide the case in this way, because if I had decided wrongly the other way, my decision, owing to the absence of the claimant under the gift over, might never be set right.

Solicitor for the vendor: *John Tarrant.* J. E. W.

BOLSTER *v.* BOLSTER.

Barton J.
1915.
Nov. 10, 24.

Married Woman—Restraint on Anticipation—Election — Compensation — Widow—Removal of Restraint on Anticipation.

By a post-nuptial settlement, a husband and wife settled, *inter alia*, a policy of insurance on the husband's life upon trust for the wife during widowhood and after her death for the children of the marriage. Under the provisions of the policy the proceeds of the policy were, on the husband's death, payable to the widow, and the policy contained a condition against assignment or attempted assignment.

Held, that there was a restraint on anticipation, and that the settlement was ineffective so far as the policy was concerned.

In re Lavender's Policy, [1898] 1 I. R. 175, followed.

Held, further, that the widow was put to her election.

Haynes v. *Foster*, [1901] 1 Ch. 390, not followed.

In re Tongue, [1915] 1 Ch. 390; *In re Hargrove*, [1915] 1 Ch. 398, followed.

ORIGINATING SUMMONS.

By an indenture, dated 22nd November, 1905, being a post-nuptial settlement made between Richard George Bolster of the first part, and Emily Caroline Bolster of the second part, and trustees of the third part, it was declared that the trustees should stand possessed of the three policies mentioned in the schedule to the indenture, and all moneys and bonuses payable in respect thereof, upon trust to invest the moneys and pay the income to Emily Caroline Bolster during her widowhood, and, after her death or second marriage, to hold the capital upon trust for the children of Richard George Bolster by Emily C. Bolster, who should attain the age of twenty-one years or marry, in equal shares, or, if only one child should attain twenty-one, then for such only child.

All the three policies were effected by Richard George Bolster on his own life. The first policy mentioned, dated 1st January, 1891, was effected with the United Kingdom Temperance and General Provident Institution for the sum of £500 with profits. The

Barton J. 1915.

BOLSTER v. BOLSTER.

second policy, dated the 20th January, 1902, was effected with the Sun Life Assurance Society for £200 with profits. The third policy, dated the 20th March, 1900, was effected with the Independent Order of Foresters for £400.

By his will, dated the 19th February, 1913, Richard G. Bolster appointed his wife his executrix, and devised and bequeathed to her all his property. The testator died on the 12th January, 1915.

The following rules of the Independent Order of Foresters applied to the third mentioned policy :—(Rule 5) "The insurance or mortuary benefit of a member shall be paid to the member himself, or to the wife or husband of, or to the affianced wife of, or the children of, or to the blood relations of, or to persons dependent upon such member, who may have been designated, as provided in the constitution and laws, by name as the beneficiary of such member." Rule 147, "(1) No policy or benefit certificate, nor benefit, nor claim for benefit, shall be sold or assigned to another, nor shall any member attempt to sell or assign his policy or benefit certificate, benefit or claim for benefit, nor shall the beneficiary or beneficiaries be changed except in the manner provided in the constitution and laws; nor shall a beneficiary, during the lifetime of a member, sell or assign his or her interest, if any, in the member's insurance or mortuary benefit or any portion thereof; and all such sales, assignments and attempted changes of beneficiaries shall be null and void from the beginning. (2) . . . if a member's beneficiary, during the member's lifetime, sell or assign, or attempt to sell or assign, such member's policy or benefit certificate, such beneficiary's interest or right, if any, in such policy or benefit certificate and the policy or benefit certificate shall *ipso facto* become and be null and void." The policy contained the following provision :—"In consideration also of the declarations and promises contained in the obligations taken by the applicants on their initiation into the order which are made part of the contract, the society agree to pay to the beneficiary or beneficiaries designated thereon a mortuary benefit of £400. The moneys which may become due under this benefit certificate are payable only to the beneficiaries duly designated from time to time by the within named member in accordance with the constitution and laws of the Order."

By a written document dated the 23rd October, 1901, Richard George Bolster directed that the mortuary benefit due at his death on the last mentioned policy should be paid to his wife, Emily Caroline Bolster.

The surviving trustee of the settlement of the 22nd November, 1905, brought the present summons for the determination of the following questions arising in the execution of the trusts of the settlement.

1. Was the plaintiff as surviving trustee of the settlement entitled to receive the sum assured by the policy of assurance effected with the Independent Order of Foresters?

2. If not so entitled, was the plaintiff entitled to impound the income of the residue of the settled funds until the death or second marriage of the defendant Emily Caroline Bolster and hold the impounded income in trust for the other defendants?

H. R. Poole, for the plaintiff :—

I. The clause against assignment in the policy is repugnant and void. *In re Lavender's Policy* (1) does not apply here. That case was the case of a married woman, and the Court could hold that the condition against assignment operated as a restraint on anticipation. The present case is one of a widow, not a married woman. Further, the note on the policy is that a legal assignment is prohibited. That would not prevent an assignment on trust. The assignment here was an assignment on trust of moneys coming in at the death of the husband. Where there is no legal assignment, there is no breach of the covenant against assignment: *Gentle* v. *Faulkner* (2). If the society had wished to enforce prohibition, they might have done so by forfeiture. They have not done so, for they have paid over the money. Policy moneys are clearly assignable unless expressly made unassignable: *In re Griffin, Griffin* v. *Griffin* (3).

II. Assuming that the assignment in trust was void, the widow is bound to elect. She cannot claim the benefits under the trust deed of the other two policies, and at the same time claim to

(1) [1898] 1 I. R. 175.
(2) [1900] 2 Q. B. 267.
(3) [1902] 1 Ch. 135.

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repudiate the trust deed in respect of the third policy: *Codrington* v. *Lindsay* (1); *Codrington* v. *Codrington* (2); *Anderson* v. *Abbott* (3). In *Haynes* v. *Foster* (4) it was held that a widow was not bound to elect; but in that case the testator expressed the intention that the restraint on anticipation should apply to spinsters, and that case was not followed in *In re Tongue* (5), and *In re Hargrove* (6), where it was held that, notwithstanding the attempted restraint on anticipation, the spinster was put to election. In *Hamilton* v. *Hamilton* (7) it was held that the lady's interests ought to be impounded in order to compensate those injured by her election. *In re Vardon's Trusts* (8) decided that, while a restraint on anticipation prevents a married woman from electing, after discoverture she must elect.

Herbert Wilson K.C., for Mrs. Bolster:—

The nomination by the husband of the wife to receive the moneys under the third policy was a settlement on the wife, with a restraint on anticipation. The case comes exactly within *In re Lavender's Policy* (9).

James Andrews, for the children of Mrs. Bolster:—

In *In re Lavender's Policy* (9) the woman who took out the policy was the only beneficiary, therefore the condition against assignment was treated as a restraint on anticipation, *ut res magis valeat.* Here the policy was taken out by the husband. The rules are rules as between the Independent Order of Foresters and the member or the beneficiary. The Independent Order of Foresters said that they would recognize only the member or beneficiary, and would ignore any trust. The rules do not affect in any way the dealings as between the beneficiary and the assignee in trust.

On the question of compensation, see *Streatfield* v. *Streatfield* (10).

Cur. adv. vult.

(1) 8 Ch. App. 578.
(2) L. R. 7 H. L. 854.
(3) 23 B. 457.
(4) [1901] 1 Ch. 361.
(5) [1915] 1 Ch. 390.
(6) [1915] 1 Ch. 398.
(7) [1892] 1 Ch. 396.
(8) 31 Ch. D. 275.
(9) [1898] 1 I. R. 175.
(10) 1 W. & T. L. C. 446.

BARTON J. :—

Barton J.
1915.
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Nov. 24.

By a post-nuptial settlement dated the 22nd November, 1905, and made between the late Richard George Bolster and his wife, Emily Caroline Bolster, three policies of insurance on the husband's life were settled upon trust for the wife during widowhood, and after her death for the children of the marriage as therein provided. As regards two of these policies, the settlement is admittedly operative. But the third was a policy effected with a Canadian society called the Independent Order of Foresters, and by the rules of that society was rendered unassignable. The member could nominate his wife, or child, or blood relations or dependents to be beneficiaries, but neither member nor beneficiary could assign on pain of forfeiture. The husband did nominate his wife, and they together purported to settle the policy. Under these circumstances, the decision of the Court of Appeal in *In re Lavender* (1) seems to be in principle applicable to the facts of this case. There was a restraint on anticipation imposed by the rules of the society upon Mrs. Bolster, and the settlement was ineffective so far as the policy was concerned.

There remains the question whether Mrs. Bolster is bound to elect. I think she is. The policy moneys came to her after the coverture was at an end, and after the restraint on anticipation had ceased to bind her. A restraint on anticipation prevents a married woman from electing: *In re Vardon's Trusts* (2). But it does not prevent a widow from electing. Upon this subject *Haynes* v. *Foster* (3) must be regarded as overruled: *In re Hargrove* (4), *In re Tongue* (5).

The answer to question 1 will be, "No"; to question 2, "Yes."

Solicitor for the plaintiff: *William C. Cooke.*
Solicitor for Mrs. Bolster: *J. C. W. Rea.*
Solicitors for Mrs. Bolster's children: *Lynch & Deering.*

D. M. S.

(1) [1898] 1 I. R. 175.
(2) 31 Ch. D. 275.
(3) [1901] 1 Ch. 361.
(4) [1915] 1 Ch. 398.
(5) [1915] 1 Ch. 390.

Ross J.
1915.
Dec. 2.

IN THE MATTER OF THE ESTATE OF LORD ORMATHWAITE.

Land Purchase Acts—Bonus—Sale of Holding, including Landlord's Turbary Rights not comprised in Tenancy—Sale for one entire Sum, no portion of Price being "earmarked" as the Purchase-money of the Turbary Rights—Percentage Scale under Schedule 1 to Irish Land Act, 1909.

A tenant bought his holding from his landlord for £2,100, the Land Commission advancing £1,700, and the tenant paying £400 into Court. Within the ambit of the tenant's holding, but not forming part of his original tenancy, was a large tract of bog, which was included in the purchase agreement, but nothing was said in the agreement as to any "earmarking" of the two sums. If the purchase price of the holding was £1,700, a bonus at the rate of 8 per cent. was payable to the landlord under schedule 1 to the Irish Land Act, 1909; if, on the other hand, the purchase price was £2,100, no bonus was payable.

Held, that the sums of £1,700 and £400 could not be "earmarked" as the respective prices of the holding and the landlord's turbary rights; that the purchase price of the holding was £2,100; and that consequently no bonus was payable.

OBJECTION to draft percentage certificate.

Richard Woulfe held the lands of Drumlaught, Lisselton, County Kerry, containing 538a. 1r. 18p., under Arthur, Baron Ormathwaite, subject to a fair rent of £76, adjusted to £75 14s. 6d., under order dated 16th February, 1898.

An agreement to purchase the holding under the Land Purchase Acts, 1903 and 1909, was executed by the landlord and the tenant on the 1st May, 1912, whereby the landlord agreed to sell and the tenant agreed to buy the holding for £2,100, of which sum the Land Commission was to advance £1,700, and the tenant was to pay £400 in cash into Court. Within the ambit of the holding was a large area of bog, of which the landlord was in the habit of making annual lettings of turbary to the tenants on the estate, which brought him in an average annual income of £77 per annum. The original proposal of the Land Commission was to advance £1,500; but when the value of the landlord's turbary

rights was pointed out, they agreed to make an advance of £1,700. For the purpose of calculating the bonus, the number of years' purchase was ascertained in accordance with clause 2 of the Treasury Regulations of the 15th February, 1910, by dividing the amount of the purchase money (£2,100) by the amount of the rent (£75 14*s.* 6*d.*). The result gave 27·7 years' purchase, a figure at which no bonus was payable under schedule 1 to the Irish Land Act, 1909. Apart from stating the fact that of the sum of £2,100, £1,700 was to be advanced by the Land Commission and £400 to be paid in cash by the tenant, the agreement was silent as to any segregation of the purchase price of the holding, or as to earmarking the sum of £400 as the price of the landlord's turbary rights.

The vendor objected to the draft percentage certificate on the following grounds:—

(1) That, according to the provisions of the Irish Land Act, 1909, there should be paid in respect of the advance of £1,700 made to the said Richard Woulfe a percentage calculated at the rate of 8 per cent. on said sum of £1,700, inasmuch as said advance represents upwards of 22 and under 23 years' purchase of the judicial rent payable by the said Richard Woulfe at the time of his agreement to purchase, which rent was fixed subsequent to August 1st, 1896, by Fair Rent Order of the Irish Land Commission.

(2) That the true purchase-money of the holding comprised in the said agreement to purchase was the sum of £1,700, inasmuch as £400 (part of the sum of £2,100 in said agreement mentioned) was the purchase-money of certain turbary rights not comprised in the contract of tenancy subject to the said Fair Rent Order, and accordingly the vendor claimed that there should be paid in respect of the advance made to Richard Woulfe a percentage calculated at the rate of 8 per cent. on the sum of £1,700.

Notice of other objections on various grounds was served, but such objections were not relied on, and are not material to the present report.

Ross J.
1915.

In re LORD ORMATHWAITE'S ESTATE.

Jellett, K.C., for the vendor:—

A landlord's turbary rights are not an appurtenance to the holding; the purchase price of the holding proper is £1,700. [He referred to schedule 1 to the Act of 1909.] The bonus is "a percentage on the amount advanced on each holding." "Holding" here means what was held by Woulfe as a judicial tenant, and the turbary rights are not included in that: see also the definition of a holding in section 57 of the Act of 1881.

[Ross J.:—But surely the basis of this transaction was that something belonging to the landlord under the Act of 1881 should be thrown into the holding?]

Yes, as an addition; but it did not form part of the holding. You must take what Richard Woulfe had—his holding under the Fair Rent Order—and nothing else. [He also referred to section 21 of the Irish Land Act, 1903.]

The Solicitor-General (*James O'Connor K.C.*) (with him *J. M. FitzGerald*) for the Treasury:—

We are here concerned with an arrangement made with the Land Commission, not with agreements made between Woulfe and his landlord. The two sums of £1,700 and £400 were bulked to form the purchase-money of £2,100. There is an ambiguity in the word "holding." The Treasury can only look at the agreement, and there is nothing in that to suggest any "ear-marking" of the sums of £1,700 and £400. A parcel of land to be sold implies the right to the soil.

[Ross J.—But the Act of 1881 gives the landlord the right to go on the tenant's lands to cut turf.]

That is a statutory reservation. There is no difference between the present case and the case where there is a valuable bog on the holding, in which the landlord has no rights. [He referred to the Treasury Regulations of the 15th February, 1910.]

Jellett K.C., in reply:—

The scope of the Land Purchase Acts is to give the tenant the fee simple of what he holds as tenant; but the sum of £2,100 includes the price of something the tenant never had.

Ross J. :—

I fear that the decision which I am about to give must work some injustice to the landlord in this case, but that is unavoidable. Before any negotiations began, the tenant was in possession of a parcel of land which he held as a second term tenant under a judicial tenancy. The landlord had a right to enter upon the tenant's land for the purpose of taking turf—a right conferred by the Act of 1881; the tenant was in possession of everything within the ambit of the farm. Then the parties came together, the object of one being to sell and of the other to buy. The tenant was buying, not his tenancy alone, but his tenancy *plus* the reversion. In the written agreement the "holding" was treated as including the landlord's entire rights over the farm, i.e. the landlord allows everything he has to be vested in the tenant for £2,100, of which the Land Commission agree to advance £1,700, and the tenant has to find the balance in cash. At first the Land Commission were reluctant to advance more than £1,500, but they agreed to advance £1,700 when the vendor's solicitor pointed out the value of the landlord's turbary rights. I cannot regard the price as severed, the price for the tenancy and the fee simple, *plus* the landlord's rights in the bog, and I accordingly declare that the landlord is not entitled to the bonus in this case.

Solicitor for the vendor: *Matthew J. Byrne.*
Solicitor for the Treasury: *Joseph Donnelly.*

T. C. T.

Barton J.
1915.
Nov. 22.
Dec 3.

In re BUTLER.
BEATTY *v.* VANCE.

Settlement—Covenant to Settle after acquired Property—Bequest of Share of Residuary Estate on trust to purchase Annuity.

A marriage settlement contained a covenant by the wife, W. V., to vest in trustees, to be held on the trusts of the settlement, any real or personal property of the value of £200 and upwards, of which she might during the marriage become seised or possessed, or have an absolute power of disposing.

A testatrix left a moiety of her residuary estate (which moiety exceeded £200 in value) to her trustees upon trust to apply it in the purchase of an annuity for W. V. during her life.

Held, that this moiety of the residuary estate was captured by the covenant to settle.

In re Dowding's Settlement Trusts, Gregory v. *Dowding*, [1904] 1 Ch. 441, distinguished.

Originating Summons.

A post-nuptial settlement, dated the 4th February, 1899, made, in pursuance of preliminary articles, between James Vance and Wilmot Ann Vance his wife, contained the following after acquired property clause:—"And it is hereby agreed that if the said Wilmot Ann Vance now is, or if during the said marriage she shall at one time, and from one source, become seised or possessed or entitled to or have an absolute power of disposing of any real or personal property of the value of £200 and upwards for any estate and interest except the property hereinbefore settled, and except jewels, plate, personal ornaments, or chattels of a similar nature . . . the said Wilmot Ann Vance shall, at the cost of the trust estate, as soon as circumstances will admit, do all such acts and things as shall be necessary or expedient for effectively vesting the same in the said trustees or trustee upon the said trusts as are hereinbefore expressed with regard to the wife's fortune."

Flora Butler, by her will, dated the 18th January, 1915, made

the following among other provisions:—"As to all the rest, residue, and remainder of my property of every nature and kind whatsoever which I may die seised, possessed of, or entitled to, I hereby give, devise, and bequeath the same as to one moiety thereof to my nephew William Wynch Beatty absolutely, and as to the other moiety thereof to my trustees hereinbefore named upon trust to realize and convert into money so much thereof as may not consist of ready money, and thereout to pay to my niece, Wilmot Ann Vance, a clear sum, free of legacy duty, of £50, and to apply the balance thereof in the purchase, in some respectable insurance company, of an annuity for the said Wilmot Ann Vance during her life." The testatrix died on the 20th June, 1915. The residuary estate passing under the will amounted to over £2000.

The plaintiffs, as executors of the will of Flora Butler, deceased, brought an originating summons for the determination of the following among other questions arising under the will and in connexion with the administration of the deceased's affairs:—"Are the plaintiffs, as executors, bound to hand over to the trustees of the settlement of the 4th February, 1899, all monetary benefits derived by Wilmot Ann Vance under the said will, including the capital sum representing one moiety of the residuary estate of the testatrix in virtue of the after acquired clause in the settlement?"

Brunskill K.C., for the executors.

Jellett K.C., for Mrs. Wilmot Ann Vance:—

This is not a case where the legatee of the annuity could claim a lump sum down. Her life interest in the annuity cannot be captured by the covenant to settle after acquired property. The trusts declared in the will as to Mrs. Vance's life interest in the annuity are not applicable to the trusts contained in the settlement as to after acquired property: *Townsend* v. *Harrowby* (1). Such a covenant does not capture an annuity: *In re Dowding's Settlement* (2). The trustees of the will are asked to tear up the

(1) 4 Jur. N. S. 353. (2) [1904] 1 Ch. 441.

Barton J. 1915.

BEATTY v. VANCE.

trusts of the will, and hand over the money to the trustees of another document to be dealt with in a way contrary to the terms of the will. An annuity in its very nature is outside the scope of a covenant to settle after acquired property: *Forster* v. *Davies* (1). The gift in the will was not a gift of a capital sum, but of income only: *Power* v. *Hayne* (2).

James Andrews, for William Wynch Beatty.

J. H. Monroe, for the trustees of Mrs. Vance's settlement :—

The annuity is caught by the covenant to settle after acquired property. When an annuity is given by a will, the corpus will be the property of the annuitant unless there is a gift over. At the testatrix's death Mrs. Vance had a right to take the value of the annuity in cash instead of the annual payment: *In Re Robbins, Robbins* v. *Legge* (3); *In Re Brunning, Gammon* v. *Dale* (4).

Jellett K.C., in reply :—

In the present will there is no gift of a definite sum to purchase an annuity. One moiety of an indefinite residue is to be applied in purchasing an annuity.

Cur. adv. vult.

Dec. 3.

BARTON J. :—

The will of this testatrix contained a direction to apply the balance of a moiety of her residuary estate in the purchase of an annuity for her niece, Mrs. Wilmot Ann Vance, during her life. The question is, whether that bequest is captured by an after acquired property clause in Mrs. Wilmot Ann Vance's marriage settlement, by which, *inter alia*, she agreed that if she, during the said marriage, should become entitled to or have an absolute power of disposing of any real or personal property of the value of £200 or upwards for any estate and interest except as therein provided, she would do all such acts and things as should be necessary or expedient for effectively vesting the same in the trustees and on the trusts of the settlement.

(1) De G. F. & J. 133.
(2) L. R. 8 Eq. 262.
(3) [1907] 2 Ch. 8.
(4) [1909] 1 Ch. 276.

If this had been the bequest of an annuity, it would be necessary to consider the applicability of the decision of Kekewich J. in *In re Dowding's Settlement* (1). But it is not a bequest of an annuity. It is a direction to apply the balance of a moiety of the residuary estate in the purchase of a life annuity. As regards a bequest of that kind, reference has been made to the judgment of Cozens Hardy M.R. in *In re Robbins* (2), applied more recently by Neville J. in *In re Brunning* (3). Cozens Hardy M.R. said: "Now, the effect of a direction to apply a definite sum of money in the purchase of a life annuity for the sole benefit of a particular individual has been often discussed, and now admits of no reasonable doubt. It is regarded as a legacy of the definite sum which will be satisfied by the purchase of an annuity; but unless and until the purchase is made, it is regarded as a legacy of the definite sum vesting in the intended annuitant on the testator's death."

It was contended that this was not a direction to apply a definite sum, because no sum is named. But, whenever we speak of a definite sum, the maxim "id certum est quod certum reddi potest" becomes applicable. The "balance of a residue" is a very appropriate example of something which is capable of being ascertained in the shape of a definite sum.

Under these circumstances we have a legacy of a definite sum to be applied in the purchase of an annuity, which the law regards as a legacy vested in the annuitant, unless and until the annuity is purchased. It seems to me that such a legacy comes within the terms of the covenant, and that Mrs. Wilmot Ann Vance is bound to do all things necessary to vest it in the trustees on the trusts of the settlement.

Solicitors for the executors: *Carruthers & Gamble.*

Solicitor for Mrs. Wilmot Ann Vance: *John T. Hamerton.*

Solicitor for the trustees of Mrs. Vance's settlement: *Nathaniel Taylor.*

D. M. S.

(1) [1904] 1 Ch. 441.
(2) [1907] 2 Ch. 8.
(3) [1909] 1 Ch. 276.

BUNYAN *v.* BUNYAN.

Barton J.
1915.
Dec. 9.

Mortgage — Order for Delivery of Possession to Mortgagee — Originating Summons — Order LV, r. 7.

The defendant, in the year 1904, had executed a mortgage of a house to the plaintiff. No part of the principal had been paid, and a large sum was due for arrears of interest. There was no prospect of the defendant being able to pay the amount due. The defendant was in possession of and residing in the house, and it was stated in an affidavit made by a local auctioneer that it would be difficult, if not impossible, to sell the premises while the defendant remained in possession. The plaintiff applied by originating summons, under Order LV, r. 7, for an order for delivery of possession, in order to exercise the power of sale in the mortgage.

Held, that although such order will not be granted as a matter of course, the case was a proper one for the exercise of the jurisdiction.

ORIGINATING SUMMONS.

This was an application on behalf of the plaintiff, Mary Bunyan, for an order that possession might be delivered to her of certain premises in the town of Maryborough, held under lease dated the 3rd June, 1902, for ninety-nine years.

By mortgage dated the 25th July, 1904, the defendant assigned to the plaintiff these premises to secure the repayment to her of the sum of £315, with interest thereon at the rate of £6 per cent. per annum.

At the date of the hearing of this application the defendant was indebted to the plaintiff on foot of the mortgage of the 25th July, 1904, in £315 for principal, and £212 12*s.* 6*d.* for interest, making in all the sum of £527 12*s.* 6*d.*

The defendant was, at the hearing of the application, in actual possession of the mortgaged property. The affidavit of the plaintiff stated as follows:—

"I require possession of the said premises in order to put the same up for sale under my power of sale as mortgagee, which I intend to do forthwith if enabled to do so by the order which I ask of this honourable court. It would be impossible to realize the property while the defendant retains possession thereof."

In an answering affidavit defendant stated that he knew of no circumstances which could justify the statement of the plaintiff that it would be impossible for her to realize the property while he, the defendant, retained possession thereof. The defendant stated that he had not interfered with the realization thereof.

Paragraph 6 of the defendant's affidavit was as follows:—

"I am a builder in a small way, and I built this house in which at present reside, besides myself, my wife and seven children. If I were compelled to give up possession thereof, it would seriously prejudice my business, which has already been considerably reduced owing to the war, and owing to the fact that my son who used to assist me in my work has enlisted."

An affidavit was made on behalf of the plaintiff by a local auctioneer, the effect of which was that in his opinion a sale of the mortgaged property would be difficult, if not impossible, while defendant remained in possession; and plaintiff, in a replying affidavit, stated that the defendant was a well-known man in the town of Maryborough, where he had considerable influence, and that she believed that if the property were put up for sale by public auction with defendant in possession, no person in the town of Maryborough, or in the district, would bid for the same.

Hugh Kennedy, for the plaintiff:—

The plaintiff seeks to go into possession of the mortgaged property as mortgagee. Her immediate object is to sell the property to the best advantage, selling by virtue of her statutory power of sale which has arisen in the circumstances disclosed in her affidavit. Apart from an exercise of her power of sale, the plaintiff is entitled to go into possession as mortgagee if she so desires.

The objection taken here is confined to procedure. The plaintiff applies for an order under Order LV, Rule 7. We rely upon *Bank of Ireland* v. *Slattery* (1).

There is really no question of fact involved in this case, and the defendant could have no defence to an action if the plaintiff had chosen the more costly procedure by writ. If the plaintiff had proceeded by originating summons for an account and sale, the

(1) [1911] 1 I. R. 33.

Barton J. 1915.

BUNYAN v. BUNYAN.

defendant would have had no answer, and the order for sale would have been supplemented, as matter of course, by an order for possession made on summons. The plaintiff has in this case, under the Conveyancing Act of 1881, a right of sale. She seeks to have this right made effective by an order for possession.

If special circumstances be required to give jurisdiction, the affidavits disclose such special circumstances.

These are, *inter alia*—(*a*) that the defendant is locally a person of consequence and influence; (*b*) that, in the opinion of a competent local auctioneer, a sale of the property would be difficult, if not impossible, while defendant remains in possession; (*c*) the complete absence of merits on the part of the defendant, who has neither paid any of the instalments of the principal according to his covenant, nor for a very long time paid any interest.

Herbert Wilson K.C., for the defendant:—

No proper case has been made to justify the Court making an order for delivery of possession under Order LV, Rule 7. The facts of *Bank of Ireland* v. *Slattery* (1) were different, and the principle of the decision is very questionable. *Doran* v. *Hannin* (2) was not cited. That decision of the Court of Appeal shows that very special facts must exist in order to justify the making of an order in this summary way, and the Court of Appeal laid great stress on the circumstance that the application was unopposed. The facts there were very special, for there was a great probability of the forfeiture of the licence attached to the mortgaged premises unless there was an immediate sale, which could not be had unless the procedure under Order LV, Rule 7, was adopted. There were some special facts in *Slattery's Case* (1) because there was evidence of active interference by Slattery and his family with the object of preventing a sale.

Kennedy in reply:—

It is impossible to apply *Doran* v. *Hannin* (2), as the report does not show the *ratio decidendi* of the Court in making the

(1) [1911] 1 I. R. 33. (2) 40 I. L. T. R. 186.

order. The furthest it can be put is to say that, upon the facts stated in the report, the Court will make the order. There is nothing in the report to justify the decision being interpreted to limit the application of the rule to cases of special circumstances, such as there appear. On the facts of the present case, the mortgagee has a statutory right to sell, and she seeks the order for possession in aid of that right.

BARTON J.:—

This is an application for delivery of possession under Order LV, Rule 7, on behalf of a mortgagee who wishes for possession in order to exercise the power of sale contained in her mortgage.

That there is jurisdiction to make an order for possession, apart from proceedings for sale, is clear under the Irish authorities: *Doran* v. *Hannin* (1); *Bank of Ireland* v. *Slattery* (2).

What was decided in those cases amounted to this. The Court has jurisdiction, in a suitable and proper case, to allow a mortgagee to go into possession as mortgagee; and an order for delivery of possession to a mortgagee may be granted on originating summons, but will not be granted as a matter of course. In *Doran* v. *Hannin* (1) the premises were licensed, and possession was required to prevent the forfeiture of the licence. In *Bank of Ireland* v. *Slattery* (2) possession was required in order to effectuate a sale, which was being prevented by the active interference of the mortgagee's family. In the present case an experienced local auctioneer deposes that it would be difficult, if not impossible, to have a successful sale while the defendant is in possession. There is a large amount of interest in arrear, and no principal has been paid, nor is there any prospect of payment. There has been no active interference by defendant, but the jurisdiction cannot depend upon the defendant's conduct alone. It is, in my opinion, a suitable and proper case for the exercise of the jurisdiction.

Solicitors for the plaintiff: *Lynch & Deering.*
Solicitor for the defendant: *W. X. White.*

R. W. L.

(1) 40 I. L. T. R. 185. (2) [1911] 1 I. R. 35.

M. R. 1915.
March 31.
April 27.
Appeal. 1916.
Jan. 28.

THE POSTMASTER-GENERAL *v.* GREAT SOUTHERN AND WESTERN RAILWAY COMPANY.

Costs—Crown—Postmaster-General—Liability of Postmaster-General to pay Costs in Proceedings under the Telegraph Act, 1878 (41 & 42 *Vict. c.* 76), *s.* 11—*Purposes for which Postmaster-General is a Body Corporate.*

In proceedings taken by the Postmaster-General under s. 11 of the Telegraph Act, 1878, costs may be awarded against him if unsuccessful.

The purposes for which the Postmaster-General is constituted a body corporate considered.

The action was brought in this case by the Postmaster-General, claiming maintenance rates for maintaining certain block signal telegraphs and wires on a section of the defendants' railway, alleged to be due under an agreement, dated the 27th June, 1883, and made between the defendants and the Postmaster-General. The Master of the Rolls having dismissed the action, the question was now argued as to whether or not he had jurisdiction to award costs against the Postmaster-General.

A. W. Samuels K.C. (with him *Monroe*, for *A. P. I. Samuels*, serving with His Majesty's forces), for the plaintiff:—

The Court has no power to order the Postmaster-General, who sues in his official capacity for the Crown, to pay costs in this case. Section 11 of the Telegraph Act, 1878 (41 & 42 Vict. c. 76), enables the Postmaster-General to institute legal proceedings for any of the purposes of the Telegraph Acts in his own name and to recover any sum due to him under the Telegraph Acts as a debt in any court, and in any manner in which it might be recovered if it were a debt due to a private person; but this section does not provide that he may be sued, nor that he should be liable to pay costs. In *Dublin County Council* v. *Postmaster-General*(1) a preliminary objection was taken that the Postmaster-

(1) [1914] 2 I. R. 208. Not reported on this point.

General could not be sued except by petition of right. The King's Bench Division held that sect. 6 of the Telegraph Act, 1868 (31 & 32 Vict. c. 110), which authorized any person to enforce any Act of Parliament, charter, grant, deed, or agreement made to, from, or by any telegraph company whose undertaking was purchased by the Postmaster-General under that Act, by action, suit, or other legal proceeding against the Postmaster-General in the same court, and in the same manner and with the same rights and liability to pay costs and otherwise as if that Act had not been passed, applied to the purchase by the Postmaster-General from the National Telephone Co., Ltd., and that the Postmaster-General could be sued in that case, as the agreements under which the county council claimed had been made with the Telephone Co., and he was ordered to pay costs, but only on the ground that sect. 6 of the Telegraph Act, 1868, authorized that particular action; and Palles C.B. in the course of his judgment laid down that the Postmaster-General could not be sued under sect. 11 of the Telegraph Act, 1878, though he could sue.

The Court of Appeal affirmed the order of the King's Bench Division, refusing to stay the action on a preliminary motion. The Court of Appeal left all question of jurisdiction to be decided on the hearing of the action, and declined to make any order as to costs of the motion, as that would have had the effect of deciding the question of jurisdiction. The action was afterwards tried by Dodd J. (1), but was dismissed upon other grounds, and the Postmaster-General waived the question of costs. The judgments on the preliminary question are not reported. Section 6 of the Telegraph Act, 1868, has only a limited application to companies whose undertakings were purchased under the Telegraph Acts of 1868 and 1869, and does not apply here. Section 3 of the Telegraph Act, 1869 (32 & 33 Vict. c. 73), defines the meaning in the Telegraph Acts of the term "telegraph company." In *Bainbridge* v. *Postmaster-General* (2) the position of the Postmaster-General under the Telegraph Acts was considered, and it was held that his immunity is not altered by these Acts; that he is only incorporated for special purposes, and is not incorporated

(1) [1914] 2 I. R. 208. (2) [1906] 1 K. B. 178.

M. R. 1915.

POSTMASTER-GENERAL v. G. S. & W. RAILWAY CO.

for the purpose of being sued, and, except under the special section referred to, the Postmaster-General cannot be sued either in contract or tort.

The Crown Suits Act, 1855 (18 & 19 Vict. c. 90), does not apply to the present case. It is confined to suits where the Attorney-General sues to recover lands, goods, or money, in suits by him on behalf of the Crown, *i.e.*, in revenue cases: *Reg.* v. *Beadle* (1); *Secretary for War* v. *Booth* (2). The preamble recites that the object of the Act was to assimilate the law as to recovery of costs in proceedings instituted by or on behalf of the Crown in matters relating to the Revenue to that in force as to proceedings between subject and subject. In *Madden's Estate* (3) Holmes L.J. says that it seems to be now settled that in certain proceedings the Crown, although it cannot be ordered to pay costs, may be awarded costs by virtue of a well-known rule of equity. In that case an attempt was made to apply the Crown Suits Act to a claim made in the Land Judge's Court by the Commissioners of Woods and Forests, but *Reg.* v. *Beadle* (1) was followed. In *The Postmaster-General* v. *Green* (4) costs on a higher scale were given to the Postmaster-General in an action in the City of London Court, to recover the sum of 3*s.* 6*d.* due in respect of a telegraph message. An appeal to the Court of Appeal was dismissed without costs, but it is not stated in the report that there was any argument as to costs. In *The King* (*Postmaster-General*) v. *Great Northern Railway Co.* (5), a mandamus case, the Court of Appeal followed the rule laid down in *Madden's Estate* (3), that the Crown will not be allowed costs in cases in which if unsuccessful the Crown would not be liable for costs.

In *Johnson* v. *Rex* (6) the Privy Council stated that they would adhere to the practice of the House of Lords, and that in future the rule should be that the Crown should neither pay nor receive costs unless the case was governed by some local statute, or there were exceptional circumstances justifying a departure from the ordinary rule. A note has been

(1) 7 E. & B. 492.
(2) [1901] 2 I. R. 692.
(3) [1902] 1 I. R. 63.
(4) 3 Times L. R. 780.
(5) [1908] 2 I. R. 32.
(6) [1904] A. C. 817.

obtained by the Postmaster-General for departmental purposes of the argument as to costs in the House of Lords in *The Postmaster-General* v. *The National Telephone Company* (1), and it appears that Lord Halsbury denied that there was any such settled practice. The decision as to costs, however, turned to a great extent upon what had passed in correspondence between the parties.

The Postmaster-General sues here under section 11 of the Telegraph Act, 1878, on behalf of the Crown, and in the absence of a statutory obligation making him liable he cannot be made pay costs.

FitzGibbon K.C. (with him, *Poole*), for the defendants:—

Reg. v. *Beadle* (2) and *Dublin County Council* v. *The Postmaster-General* (3) do not affect the case. The Postmaster-General is not the Crown, nor does he sue by the Attorney-General. The present case falls within the third head mentioned in *Johnson* v. *Rex* (4), at p. 824, viz., where the Crown, or the Postmaster-General on its behalf, has adopted the position of an ordinary litigant. The defendants rely on section 11 of the Telegraph Act, 1878, which provides that the Postmaster-General may recover a sum of money as if it was a debt due to a private person. That applies here, as the agreement on which the action is brought refers to the Telegraph Acts, 1868, 1869, and the Postmaster-General sues under the power given by section 11. There is no need to contend that the Postmaster-General would be liable to account. In *The Dublin County Council* v. *Postmaster-General* (3), Palles C.B. said that the Postmaster-General could not be sued, but a counter-claim for an account would come within the provisions of the Judicature Act which enable the Court to give relief to a defendant. The defendant could surely set off. [THE MASTER OF THE ROLLS:—If the Postmaster-General had got judgment in this case, would it be a Crown debt?] It is a debt

(1) The material part of this note is set out in the judgment of the LORD CHANCELLOR, *post*, pp. 89, 90.

(2) 7 E. & B. 492.

(3) [1914] 2 I. R. 208: not reported on this point.

(4) [1904] A. C. 817.

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due to the Crown, but is recoverable by the Postmaster-General as if he was a private person. [*Samuels K.C.* mentioned *In re Behan, A Bankrupt* (1).] *Bainbridge* v. *Postmaster-General* (2) is not in point here; it is not suggested that the Postmaster-General is liable for the acts of his servants. The case of *Postmaster-General* v. *National Telephone Company*, of which a print has been produced (3), is an authority for the proposition that the Postmaster-General can be made pay costs. [He referred to the argument in the Court of Appeal in that case (4).] The Court of Appeal gave costs against the Postmaster-General. The decision of the Court of Appeal, on the merits, was reversed by the House of Lords; but there is nothing to show that they thought that the Court of Appeal had no jurisdiction to give costs against the Postmaster-General, and the House of Lords gave costs to him as he succeeded. In the unreported case of *The Postmaster-General* v. *Great Southern and Western Railway* Gibson J. evidently considered that the Postmaster-General could be made pay costs if he was unsuccessful. It is contended that there are no funds to pay costs here, but that point was disposed of in *Wheeler* v. *Commissioners of Public Works* (5). There are no express words in the Act of 1878 binding the Crown, but section 11 is a procedure enactment giving power to the Postmaster-General to sue as an ordinary litigant; and if he adopts that method of procedure he incurs the ordinary litigant's liability to pay costs. It may be that the Statute of Limitations could not be pleaded to a claim by the Postmaster-General, but that is not a procedure statute. The Judicature Act does not bind the Crown; but here the Postmaster-General is not the Crown.

Samuels K.C., in reply.

Cur. adv. vult.

(1) [1914] 2 I. R. 29.
(2) [1906] 1 K. B. 178.
(3) The material part of this print is set out in the judgment of the LORD CHANCELLOR, *post*, pp. 89, 90.
(4) [1908] 2 Ch. 172.
(5) [1903] 2 I. R. 202.

O'CONNOR M.R.:—

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After my judgment dismissing this action, counsel for the Postmaster-General submitted that there was no jurisdiction to award costs against him. The general rule is that the Crown is not liable for costs, and can get no costs. If, therefore, this action was brought by the King in the name of the Postmaster-General as his servant, and in that character only, he would have immunity against the costs of the action.

The defendants, however, contend that the Postmaster-General did not sue as a servant of the Crown, but as a body corporate constituted by statute, entitled to hold property, to enter into contracts, and to bring actions in the assertion of his corporate rights.

The Postmaster-General was made a body corporate by the 3 & 4 Vict. c. 96, s. 67, with power to hold land and other property. By the Telegraph Act, 1868, he was given power to purchase the undertakings of certain telegraph companies therein mentioned, and by the 6th section of that Act it is enacted as follows:—"All Acts, charters, and grants, and all valid deeds and agreements made to, from, by, or with any company whose undertaking shall be sold and conveyed to the Postmaster-General under the powers of this Act shall (except as far as they are by this Act expressed to be varied or repealed, or are inconsistent with the provisions of this Act) remain in full force, and all matters to be done, continued, or completed, or which, but for the passing of this Act, would, might, or could be done, continued, or completed, by or against the company so selling their undertaking, their officers or servants, shall or may (as the case requires) be done, continued, or completed by or against the Postmaster-General, his officers and servants, and those Acts, charters, grants, deeds, and agreements shall be construed as if the Postmaster-General had been named therein instead of the company so selling their undertaking; and it shall be lawful for any person to enforce any such Act, charter, grant, deed, or agreement by action, suit, or other legal proceeding against the Postmaster-General in the same court, and in the same manner, and with the same rights and liabilities to pay costs and otherwise, as if this Act had not been passed."

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If the subject-matter of the present action comes within that section, it is clear that the Postmaster-General is liable to pay the costs. I will consider this later on.

By the Telegraph Act, 1878, s. 11, it is enacted that :—

"In the Telegraph Act the expression 'Postmaster-General' means Her Majesty's Postmaster-General for the time being.

"Any legal proceeding may be instituted by the Postmaster-General for any of the purposes of any of the Telegraph Acts in the name of Her Majesty's Postmaster-General for the time being, and shall not abate or be discontinued by reason of any change in the person who is Postmaster-General, but may be carried on as if Her Majesty's Postmaster-General for the time being were a body corporate; and when any sum is due or payable to the Postmaster-General under any of the Telegraph Acts, or any contract, agreement, or regulations made in pursuance of or for any of the purposes of those Acts or any of them, the Postmaster-General may recover the same as a debt in any court, and in any manner in which it might be recovered as if it were a debt due to a private person."

This section most certainly governs the present action, which was brought for the purpose of enforcing a contract made in pursuance of and for the purposes of the Telegraph Acts. It is to be observed, however, that while the section gives the Postmaster-General power to sue, it does not, at any rate expressly, impose on him the liability of being sued or of paying costs.

The plaintiff's main argument was that the Postmaster-General is under no liability to pay costs except under sect. 6 of the Act of 1868, and that the present action does not come within it.

The section seems to me to deal only with rights and obligations of the companies whose undertakings were to be acquired by the Postmaster-General. It says, in effect, that any right of any such company shall vest in the Postmaster-General, and that any obligation affecting it shall devolve upon him, with the liability to be sued and to pay costs.

The present action is not concerned with any right vested in a company whose undertaking was acquired under the Telegraph Acts. The right of action sprung from an agreement with the Postmaster-General himself, and therefore I think that the section has no application.

The case is distinguishable in this respect from *Dublin County Council* v. *Postmaster-General* (1), in which the cause of action was alleged to arise out of a contract with the National Telephone Company, whose undertaking he had acquired. The question in that case was whether s. 6 of the Act of 1868 applied; and it was held by the King's Bench Division that it did, because the effect of s. 7 of the Act of 1869 was to extend its scope so as to make it applicable to Telegraph companies whose undertaking the Postmaster-General had not agreed to purchase, or had not been required to purchase, under the Act of 1868. In that case the contract giving the alleged cause of action was with the company, whose undertaking was acquired; but in the present case the contract was with the Postmaster-General. Therefore I think that the judgment of the King's Bench Division does not apply.

I was referred, however, to the *Postmaster-General* v. *The National Telephone Company* (2), in which a special case was stated for the purpose of determining whether the Postmaster-General had a monopoly in the transmission of certain classes of telephone messages. In the court of first instance judgment was given in favour of the Postmaster-General, but there was no mention of costs. This omission was alleged to have been due to an oversight. The Telephone Company appealed, and the Court of Appeal reversed the court below. An argument then ensued as to the liability of the Postmaster-General to pay costs, and the Court gave judgment against him with costs of the appeal and in the court below. The decision as to the costs is, however, not very satisfactory, because it turned to some extent on a letter written by the solicitor for the Postmaster-General to the solicitor for the Telephone Company, before the judgment of the court below was made up, urging that there should be inserted in it a direction that the company should pay the Postmaster-General's costs, and saying that if the company succeeded on appeal they would get the costs in both courts. The Master of the Rolls in giving judgment in the Court of Appeal said:—"I have no doubt this case will go to the House of Lords. I assume that, and if we are

(1) [1914] 2 I.R. 208. Not reported on this point.

(2) [1907] 1 Ch. 621; [1908] 2 Ch. 172; [1909] A.C. 269. For the decision in the House of Lords on the question of costs see the judgment of the Lord Chancellor, *post*, pp. 89, 90.

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wrong the House of Lords will easily set us right. Having regard especially to the letter which Sir R. Hunter wrote, I think we ought to make an order allowing the costs here below." That is a judgment which can scarcely be relied upon as a definite opinion on the liability of the Postmaster-General to pay costs; but from the observations made by the Master of the Rolls in the course of the arguments, it appears that he adopted the view presented by counsel for the Telephone Company, that the Postmaster-General sued as a corporation, and not as a servant of the Crown.

The case, however, went to the House of Lords, and the judgment of the Court of Appeal was reversed, and the defendants were ordered to pay the costs of the Postmaster-General in all the courts. The House declined to apply the principle that costs are neither given to the Crown nor against the Crown (1).

We have, however, the decision of the King's Bench Division in Ireland in *Postmaster-General* v. *Great Southern & Western Railway Co.* (2), which was an action brought to establish the right of the Postmaster-General to have free carriage over the company's railway for materials and men in connexion with telephonic communication. Judgment having been given for the plaintiff, the Attorney-General asked that it should be with costs, whereupon Gibson J. said:—"So far as I can see the Postmaster-General is entitled to get his costs. I mean he does not come within the same category as the Crown." And he says afterwards: "The general proposition is that the Crown is not liable for costs, and can get no costs; but the Postmaster-General is an independent corporation." After discussion the parties were allowed to bear their own costs, but distinctly on the ground that it was not a case in which, on the merits, costs ought to have been given, and not on the ground that there was no jurisdiction.

This is a decision in point, and it binds this court. I may, however, say for myself that a perusal of the Telegraph Acts convinces me that the Postmaster-General is an independent corporation, as stated by Mr. Justice Gibson. I refer to s. 22 of the Telegraph Act, 1868, which provides that all land, property, and undertakings purchased by the Postmaster-General

(1) See *post*, pp. 89, 90. (2) Unreported.

under this Act shall be assessable and rateable in respect of local, municipal, and parochial rates, assessments, and charges. This imposes a liability from which Crown property is exempt. Again, for the purpose of facilitating the acquisition of property by the Postmaster-General, the Lands Clauses Acts are incorporated in the Telegraph Act, 1869, by s. 10, and the Postmaster-General is placed in the position of "the promoters of the undertaking," and thereby made liable to costs. Further, by the Telegraph Act 1878, s. 4, differences between the Postmaster-General and road authorities are brought within the Regulation of Railways Act, 1868, which again makes him liable for costs.

Provisions such as these all go to show that the Postmaster-General is an independent corporation, separate and distinct from the Crown, having the rights and liabilities of an ordinary corporation.

I am, therefore, of opinion that the Postmaster-General must pay the costs of this action, including the costs of the further argument as to costs.

W. L.

1916. Jan. 28.

The plaintiff appealed from the judgment of the Master of the Rolls dismissing the action, and from the order directing the plaintiff to pay the costs (1).

The Court of Appeal affirmed the judgment of the Master of the Rolls dismissing the action, and the question as to the jurisdiction to award costs against the Postmaster-General was now argued.

A. W. Samuels K.C. (with him *J. Monroe*, for *A. P. I. Samuels*, serving with His Majesty's forces), for the appellant:—

The Master of the Rolls has decided the question of costs on the ground that the Postmaster-General is for all purposes an independent corporation distinct from the Crown. We submit that this view is erroneous. If it were to prevail, the Postmaster-General could be sued in an ordinary action, instead of the remedy

(1) In the Court of Appeal, before SIR IGNATIUS J. O BRIEN L.C., CHERRY L.C.J., and MOLONY L.J.

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being by petition of right. The Postmaster-General is, no doubt, made a body corporate by s. 67 of 3 & 4 Vict. c. 96, a Post Office, and not a Telegraph Act (see also the Post Office Act, 1908, 8 Edw. 7, secs. 45, 46, 47), but he is made such merely for the purpose of enabling him to hold lands for the service of the post office, and to transmit them to his successor. He is not made a body corporate for all purposes: *Bainbridge* v. *Postmaster-General* (1). Section 11 of the Telegraph Act, 1878, merely provides that proceedings instituted by the Postmaster-General shall not abate by reason of a change in the person who is Postmaster-General, but may be carried on as if the Postmaster-General for the time being was a body corporate, and he may, for the purposes of the Telegraph Acts, sue on contracts and recover debts as if he were a private person. That is merely an enabling procedure section. His status is not changed. In the present case the Postmaster-General sues, not as being himself a corporation, but on behalf of the Crown, and is not, therefore, liable for costs. In *Secretary for War* v. *Booth* (2) it was held, following *Reg.* v. *Beadle* (3), that costs could not be given against the Secretary for War suing in ejectment on behalf of the Crown, and that the Crown Suits Act, 18 & 19 Vict. c. 90, did not apply to such a case.

[THE LORD CHANCELLOR:—Where the Postmaster-General takes advantage of the procedure under the Judicature Act, is he not subject to sect. 53 of that Act, which provides that costs are to be in the discretion of the Court? That was the ground, I think, of the decision in this Court in *In re Bear Island Defence Works, Ex parte Doyle* (4).]

That section was relied on by the respondents in *In re Madden's Estate* (5). There the Commissioners of Woods and Forests had put forward a claim to certain lands which were being sold in the Land Judge's Court, and the decision of the judge being against them, they appealed to the Court of Appeal, but subsequently withdrew the appeal. The respondents contended that they could

(1) [1906] 1 K. B. 178.
(2) [1901] 2 I. R. 692.
(3) 7 E. & B. 492.
(4) Unreported. Court of Appeal, 1 Dec., 1902.
(5) [1902] 1 I. R. 63.

not do so without paying the costs. It was held that, as the Commissioners were suing on behalf of the Crown, they were not liable to costs. The argument founded on the 53rd section of the Judicature Act was dealt with by FitzGibbon L.J., and Walker L.J., and they held that it did not give jurisdiction to order the payment of costs in any case where costs could not have been awarded before the Act.

In *The King* (*Postmaster-General*) v. *Great Northern Railway* (1), an application for a mandamus, the Court refused to give costs to the Postmaster-General, on the ground that costs could not be given against him.

The decision as to costs by the House of Lords in *Postmaster-General* v. *National Telephone Company* (2) turned on the correspondence.

The Master of the Rolls relies on sect. 22 of the Telegraph Act, 1868, which he says imposes on property purchased by the Postmaster-General a liability to rates from which Crown property is exempt. But that section merely makes such property liable according to the rateable value at the time of the purchase. So long as it is held by the Postmaster-General it is not liable to any additional rate by reason of an enhanced value: *Overseers of St. Gabriel*; *Fenchurch* v. *Williams* (3).

The Master of the Rolls refers to the case of the *Postmaster-General* v. *Great Southern and Western Railway Co.* (4) as being a decision on the point; but the Court there did not decide the question of jurisdiction; they refused on the merits to give the Postmaster-General costs, and the observations of Gibson J., referred to by the Master of the Rolls, are merely interjected by way of discussion, and not of decision.

Under sect. 11 of the Telegraph Act, 1878, the Postmaster-General can, we submit, recover costs. If the decision that when suing under that section he can be made pay costs is to be supported at all, we submit that it can only be on the ground that where the Crown can recover costs under such a statutory

(1) [1908] 2 I. R. 32.

(2) The discussion as to costs, and the decision of the House of Lords, are set out in the judgment of the LORD CHANCELLOR, *post*, pp. 89, 90.

(3) 16 Q. B. D. 649.

(4) Unreported.

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provision, a reciprocal liability to pay costs may be implied; but the contention that the Postmaster-General is an ordinary corporation for the purposes of the Telegraph Acts, and does not represent the Crown, is unsustainable, and there is no authority for such a proposition.

FitzGibbon K.C. and *Poole*, for the respondents, were not called on.

SIR IGNATIUS J. O'BRIEN L.C.:—

The question which has been so fully and ably argued by Mr. Samuels on behalf of the Postmaster-General in this case narrows itself down, in my opinion, to a very small one. The proceedings were taken by the Postmaster-General under sect. 11 of the Telegraph Act, 1878. The Postmaster-General in normal circumstances, apart from any statute making him a corporation, can enforce his rights as a servant of the Crown only by a proceeding taken by the Attorney-General on behalf of the Crown. In the present case, however, the proceedings are, as I have said, taken by the Postmaster-General in his own name under sect. 11 of the Telegraph Act, 1878; and, having regard to the decision of the King's Bench Division in *The Secretary for War* v. *Booth* (1), following *Reg.* v. *Beadle* (2), and adopted by the Court of Appeal in *In re Madden's Estate* (3), it is settled that the provisions as to costs in the Crown Suits Act, 1855 (18 & 19 Vict, c. 90), do not apply to the costs in proceedings of this kind, being confined to proceedings taken in the manner and form contemplated by that Act. The case, accordingly, must be considered altogether from the point of view of what is the position of the Postmaster-General when he institutes proceedings under sect. 11 of the Telegraph Act, 1878, and what is the jurisdiction of the Court with regard to the costs of such proceedings. That question is, in my opinion, quite apart from the wider and more important question which was argued both here and in the Court below, namely, whether or not the Postmaster-General is for all the purposes of the Telegraph

(1) [1901] 2 I. R. 692.
(2) 7 E & B. 492.
(3) [1902] 1 I. R. 63.

Acts a corporation, and subject, when he invokes the jurisdiction of the Court, to all the liabilities to which an ordinary litigant would be subject under sect. 53 of the Judicature (Ireland) Act, 1877, which regulates the giving or withholding of costs in all proceedings taken under that statute.

Mr. Samuels contended against the Court laying down so universal a proposition, which would have very far-reaching effects, and which, he said, might in other cases seriously embarrass the Postmaster-General in the future conduct of the business of the Crown.

Section 11 of the Telegraph Act, 1878, does not appear to me to be a section placing the Postmaster-General in the position of an ordinary litigant in all respects. It is guarded in its terms, and does not enable the Postmaster-General to be sued; it only enables him to institute proceedings for the purposes of the Telegraph Acts *as if he were a body corporate*, and to recover as a debt any sum payable to him under the Telegraph Acts in the manner in which it might be recovered *if it were a debt due to a private person.*

The decisions in this country with regard to the position of an officer of State suing in respect of rights which are vested in the Crown are not altogether easy to reconcile. As was pointed out by Mr. Samuels in his learned argument, the King's Bench Division in the case of *The Secretary for War* v. *Booth* (1) refused to hold that the Secretary of State for War was liable for costs. I presume it is to be assumed that for the purpose of the proceedings in that case, which was an action of ejectment, he was suing as a corporation. In the subsequent case of *In re Madden's Estate* (2) the Commissioners of Woods and Forests had appeared in proceedings in the Land Judge's Court, seeking to establish the right of the Crown to certain lands. The Court of Appeal held that the Commissioners of Woods and Forests were to be treated for all intents and purposes as the Crown, and that there was no jurisdiction to award costs against them. Incidentally, the view of the King's Bench Division in *Booth's Case* (1) was adopted. The case of *Gardiner's Estate* (3) also confirms this view, because the Court of Appeal there held that Ross J. was not justified in

(1) [1901] 2 I. R. 692.
(2) [1902] 1 I. R. 63.
(3) 37 I. L. T. R. 164.

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making an order imposing terms on the Commissioners of Woods and Forests as a condition to hearing them, which would, if they had consented, have given him jurisdiction to award costs against them; the ground of the decision being that they had a right to be heard whatever their position with regard to costs might be, which was a question, as I understand, to be determined by the Court guided by the statutes giving jurisdiction.

On the other hand, there is a case in this Court of *In re the Bear Island Defence Works*; *Ex parte Doyle* (1), where property was taken under the Defence of the Realm Act and the Lands Clauses Act of 1845, and the Court held that as the Crown took advantage of the procedure under these Acts to acquire property, it was liable to pay costs in the same manner as any other undertaker, including the costs of making title, and the costs of an appeal which was taken from an order of the Master of the Rolls, all the proceedings on the appeal having been taken under the power conferred by the Judicature Act.

That case is not reported, but we have a full and accurate note in the registrar's book, and I thought that at one time I might have some difficulty in reconciling the language of the judgments with the views expressed in the other cases to which I have referred. But, in the view which I take of the present case, I only refer to these authorities in order to emphasize that I do not at all approach the question of determining whether or not the decision of this Court in *In re Madden's Estate* (2) would be, in a case outside the section we are dealing with here, a conclusive authority in favour of Mr. Samuels' contention. If the point was open, there would be much to be said for his view on the grounds on which he presented it to us, but, having regard to the decision of the House of Lords in the case very properly brought under our notice by him, it would not be right for this Court, even if it entertained an opinion in favour of the contention of the Postmaster-General, to accede to it in the present case.

The case to which I refer is the case of the *Postmaster-General* v. *National Telephone Company*. Although reported in the

(1) Unreported. Court of Appeal, Dec. 1, 1902.

(2) [1902] 1 I. R. 62.

Law Reports (1) on the general question, it is not reported on this question of costs, and we are obliged for the impartiality and courtesy of the solicitor for the post office in placing before us a report, which was taken for public purposes, of the discussion which took place in the House of Lords with regard to the costs. The proceedings in that action were unquestionably taken under sect. 11 of the Telegraph Act, 1878, the section under discussion here. It appears that in the Court of Appeal a letter from the solicitor of the Postmaster-General was produced which might be construed into a consent that, whatever the legal position might be, the costs should follow the event. In the House of Lords the decision on the general question was in favour of the Postmaster-General, and a discussion then took place as to costs. Sir Robert Finlay, for the National Telephone Company, stated that he understood that the practice of the House had been that, unless in exceptional cases, costs were neither given to the Crown nor against the Crown in that House. Lord Halsbury remarked that that was not his understanding of the practice. In answer to an inquiry of the Lord Chancellor as to how the question of costs was dealt with below, Sir Robert Finlay said: "In the Courts below it had a very curious history indeed. In the first Court the Postmaster-General succeeded, and he applied for costs—not at the time, but afterwards—and we objected. Then it came up to the Court of Appeal, where we succeeded in reversing it; and we read a letter from the solicitor of the Postmaster-General saying that it was a case in which costs would clearly follow the event. That letter was written when the Postmaster-General had been successful. The various authorities were referred to. My friend Mr. Danckwerts argued the point, and ultimately the Court of Appeal gave us the costs. Now it has come before your Lordships, and it will be for your Lordships to say what the practice of your Lordships' House on the matter is." The report proceeds:—

"The Earl of Halsbury: I am afraid I am the senior here, and I entirely deny that any such practice has ever been laid down. That it may have been done from time to time may be true, but I certainly have never been a party to any such declared

(1) [1907] 1 Ch. 621; [1908] 2 Ch. 172; [1909] A. C. 269.

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practice. We have dealt with the costs in each case according to our view of what the justice of the case was.

"Lord Macnaghten: I remember a case in the Privy Council where it was argued, but I am not quite sure what the decision was. I think the result was that the Privy Council said they would follow the practice of the House of Lords.

"Sir Robert Finlay: Yes.

"Lord Macnaghten: I think they were persuaded that it was the practice in the House of Lords, at any rate in general, not to give costs against the Crown.

"Sir Robert Finlay: Yes, that is exactly my impression, that the practice of the House of Lords was ordinarily not to give costs for or against the Crown, but that there was always the power to do it, and that in special cases they would do it; and I think the Privy Council announced that they would follow that practice in future.

"The Earl of Halsbury: The Privy Council cannot dictate to us.

"The Lord Chancellor: I think the appellants ought to have costs throughout here.

"The Earl of Halsbury: Yes."

The result was that the House of Lords gave the Postmaster-General the costs both in that House and in the Courts below; and I take it that they could not have given costs in his favour in all Courts unless their view was that in such a proceeding costs could have been given against him. It is not for me to criticize a decision of the House of Lords, and I am glad to say that it relieves me, as I conceive, from all difficulty in this case, whether the matter is looked at from the point of view of the Postmaster-General as representing the Crown or not.

This being so, the question is simply, if, as the House of Lords must as I understand have considered, there was jurisdiction to give costs in a proceeding under s. 11 of the Telegraph Act, 1878, in favour of the Postmaster-General suing as a *quasi* body corporate, there must also be jurisdiction to give costs against him. If he is to be treated as having a right to bring an action in his name as Postmaster-General, as if a body corporate, and to recover a sum due to him as if a debt due to a private person, it seems to me

that if he invokes a procedure for his benefit which incorporates s. 53 of the Judicature Act, he must be liable under the same provisions to the penalty of paying costs if he fails, and it would be impossible for me, having regard to the decision of the House of Lords, to hold otherwise.

On that ground, and not on the wider ground on which the Master of the Rolls seems to have based his judgment, I hold that the Postmaster-General must pay the costs both here and below.

CHERRY L.C.J. and MOLONY L.J. concurred.

Solicitor for the appellant: *E. R. Bate.*
Solicitor for the respondents: *Croker Barrington.*

J. G. T.

Ross J.
1915.
Nov. 25.

DRAKE *v.* GAYNOR.

County Court—Administration suit by Personal Representative—Suit brought in Civil-bill Jurisdiction in which Personal Representative resided, but not that in which Deceased had last Place of Abode or Defendant resided—Jurisdiction of Civil-bill Court—County Officers and Courts (Ireland) Act, 1877 (40 & 41 *Vict. c.* 56), *s.* 40 (*c*), (*h*)—*County Court Amendment (Ireland) Act*, 1882 (45 & 46 *Vict. c.* 29), *s.* 10 (*a*).

A suit for the administration of the personal estate of a deceased person was brought by the personal representative against one of the next-of-kin in the civil-bill Court of the county of C., within the jurisdiction of which the plaintiff resided. The deceased had not her last place of abode or business in county C., nor did the defendant reside in that county.

Held, that the county court judge of County C. had no jurisdiction to hear the case.

Case stated by the county court judge of Cavan, pursuant to sect. 6 of the County Court Appeals (Ireland) Act, 1889 (52 & 53 Vict. c. 48).

The following are the facts set out in the case stated, in so far as they are material to the present report:—

Bridget Drake, the plaintiff, administratrix of Catherine Gaynor, deceased, brought an equity civil bill before the county court judge of County Cavan for the administration of the estate of Catherine Gaynor, against the defendant, Thomas Gaynor, one of the next-of-kin of Catherine Gaynor. The plaintiff was resident in County Cavan, the defendant was resident in County Meath, and the deceased had also been, at the time of her death, resident in County Meath. When the suit was opened before the county court judge, defendant's counsel took the objection that the judge had no jurisdiction to entertain it, but that it should have been brought in County Meath. Plaintiff's counsel, relying on sect. 40 (*c*) of the County Officers and Courts (Ireland) Act, 1877, and sect. 10 (*a*) of the County Court Amendment (Ireland) Act, 1882, submitted that the judge had jurisdiction. The county court judge held that he had no

jurisdiction, in view of the fact that when the Act of 1877 was passed executors could not bring a suit for administration in the county court, and that therefore section 40, sub-s. (*c*), could not have been intended to govern the present case, and that the sub-section was not extended by s. 10 (*a*) of the County Court Amendment (Ireland) Act, 1882.

The question submitted by the county court judge for the decision of the Court was—had he jurisdiction to try the case?

Babington for the plaintiff:—

Section 33 of the County Officers and Courts (Ireland) Act, 1877, conferred equitable jurisdiction on the county court judge in a number of different matters. Sub-s. (*a*), which confers jurisdiction in administration, only extends to suits by creditors or beneficiaries, and does not include suits by personal representatives. Section 40 (*c*) enacts that administration proceedings "shall be taken in the civil-bill Court within the jurisdiction of which the deceased person had his last place of abode," or "within the jurisdiction of which the executors or administrators or any of them shall reside." Section 40 (*h*) provides that "Proceedings not otherwise provided for shall be taken or instituted in the civil-bill Court within the jurisdiction of which the defendants or any of them shall reside or carry on business." This statute was amended by the County Court Amendment (Ireland) Act, 1882, s. 10 of which provides that "The several civil-bill Courts in Ireland shall, in addition to the jurisdiction now possessed by them, have and exercise all the power and authority of the High Court of Chancery in the suits and matters hereinafter mentioned, that is to say: . . . (*a*) In suits by executors or administrators for the administration of assets." No venue is named in this section, and the question for decision is whether an administration suit by a personal representative falls within s. 40 (*h*) of the Act of 1877, as a matter not otherwise provided for, or falls within s. 40 (*c*) as being a suit for the administration of assets within that section. And, further, whether if the suit is within sub-s. (*c*) the last clause of the section applies to a suit in which a personal representative is plaintiff, as distinguished from a suit in which he is defendant.

It has been universally and rightly assumed that the case is

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governed by sub-s. (*c*), and in some county courts it is the practice in a suit by a personal representative to proceed if such personal representative resides in the county, although the residence of the deceased was in another county. In some other county courts the practice has been to refuse jurisdiction in such cases. I submit that the first-mentioned practice is right. The amending section must be read back into the statute of 1877, and there the clear words of s. 40 (*c*) confer jurisdiction.

No doubt, as it originally stood, the personal representative could only be a defendant, but the Legislature must be taken to have known this when it passed the amending Act, and that the effect of the amending Act would be to allow personal representatives to sue in the county in which they reside.

This is obviously convenient and reasonable. The personal representative is the chief accounting party, and his presence is constantly necessary, while the last place of abode of the deceased may be inconvenient for everybody. Moreover, if the statutory venue is inconvenient, s. 40 contains a proviso to the effect "that if during the progress of any such suit, matter, or proceeding it shall be made to appear to the chairman that the same may be more conveniently prosecuted in some other civil-bill Court, the chairman may, with the consent of the Lord Chancellor, transfer the same to such other civil-bill Court, and, thereupon, the suit, matter, or proceeding shall proceed in such other civil-bill Court."

No inconvenience or absurdity can arise from holding that the personal representative can sue in his own county that does not arise under s. 33 (*a*) and s. 40 (*c*), as they stood originally. An executor resident in County Cork can clearly be sued for administration there, though his testator's property and last place of abode were situate in the County of Londonderry, and there can be no more inconvenience caused by allowing the executor to sue in the County of Cork under similar circumstances, subject to the right of transfer provided by the section.

The clear words of s. 40 (*c*) give the personal representative a right to sue in his own county. That sub-section must be applied as a whole to the extended jurisdiction. The Court cannot apply the first clause and reject the second. The Legislature can never have intended that an executor or administrator can be sued, but cannot sue in his own county.

T. J. Smyth for the defendant:—

The county court judge was right in declining jurisdiction. At the time of the passing of the County Courts Act of 1887, the chairman of quarter sessions had generally only jurisdiction over defendants residing within their counties. Consequently when the equitable jurisdiction was conferred upon the county court, and it became necessary to deal with the place where equitable proceedings had to be instituted, some modification became necessary, and the jurisdiction was conferred upon the county court judge where the subject-matter of the suit was situate, or where the defendants resided. Under the County Courts Act of 1877 personal representatives could not bring a suit for administration, consequently the Act provided that the suit could be brought against them either where the deceased had his last place of abode or business, or within the jurisdiction in which the personal representatives resided. This latter provision was inserted to give personal control over the personal representatives. The Act of 1882, in enabling personal representatives to be plaintiffs, did not enable them to select their own abode as the place to give jurisdiction, and the abode of the deceased still remained the place to which the jurisdiction attached.

If the foregoing argument is incorrect, then this is a case not otherwise provided for, and under s. 40 (*h*) the proceedings can only be brought where the defendant resides.

Ross J.:—

Up to the passing of the Act of 1877, the jurisdiction of the chairman of quarter sessions was limited to cases where the defendant lived in the county. By that Act (Part II, s. 33) equitable jurisdiction in certain specified matters is conferred on the county courts to a limited extent. Section 40 prescribes in what county proceedings are to be taken. In most cases they must be taken within the county where the defendant resides, but there are certain exceptions conferring jurisdiction on the Court within the jurisdiction of which the applicants reside. In administration suits the proceedings are to be taken in the civil-bill Court within the jurisdiction of which the deceased person had his last place of

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abode, or within the jurisdiction of which the personal representatives reside. Here we have the area of jurisdiction defined with precision. The County Court Amendment Act of 1882 made a change. What was the extent of the change? Up to the passing of that Act the personal representative had no power to bring a suit for the administration of the assets. He might induce a friendly creditor or a legatee to act as plaintiff; but if he could not procure a plaintiff, he was left without protection in the administration of the assets.

The change that was made simply amounted to this, that the personal representative might himself sue for the administration of the assets.

The venue of the suit is left exactly as it was under the 40th section of the Act of 1877. This is the only change, and we are not justified in importing into the amending Act anything that would alter the venue as it had previously existed.

I hold the county court judge was right in declining jurisdiction, and I dismiss the appeal.

Solicitors for the plaintiff: *Cochrane & Co.*
Solicitor for the defendant: *J. C. Callan.*

T. C. T.

FEE *v.* BALLYMAHON RURAL DISTRICT COUNCIL.

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Local Government—Labourers Acts—Failure of District Council to make arrangements for erection of Labourers' Dwellings within two years—Land acquired compulsorily on Lease—Right to Re-conveyance—Labourers (Ireland) Act, 1883 (46 & 47 *Vict. c.* 60), *s.* 15—*Labourers (Ireland) Act*, 1885 (48 & 49 *Vict. c.* 77), *s.* 4—*Statute—Construction—Incorporation.*

The provisions of s. 15 of the Labourers (Ireland) Act, 1883, which enable the former owner of land, compulsorily acquired in fee by a district council for the purpose of the Act, to require the land to be re-conveyed to him upon failure by the district council to make arrangements for the erection of the labourers' dwellings within two years after the confirmation of the Provisional Order, are not extended by s. 4 of the Labourers (Ireland) Act, 1885, so as to apply to lands compulsorily acquired for a term of years under that section.

CASE STATED by Kenny J., on the hearing of an equity civil bill appeal, at Longford Spring Assizes, 1914.

The plaintiff brought an equity civil bill, claiming (1) a declaration that the defendant council were trustees for the plaintiff of all the estate and interest in a portion of the plaintiff's land compulsorily acquired by them under the provisions contained in sect. 4 of the Labourers (Ireland) Act, 1885; and (2) that the defendants be ordered to re-convey the aforesaid lands to the plaintiff. The following facts are taken from the case stated :—

In the year 1908, portion of the lands of the plaintiff was compulsorily acquired by the defendants under the Labourers (Ireland) Acts, 1883 to 1906, as a site for labourers' cottages. The plaintiff was the owner in fee of the said lands, which were situate in the rural district of Ballymahon. The defendants had made a scheme whereby it was proposed that land should be taken compulsorily for a term of ninety-nine years for the purpose of the erection of labourers' cottages thereon. A provisional order confirming the scheme was made by the Local Government Board on the 27th December, 1907, and

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this order was confirmed on the 3rd March, 1908. The rural district council thereupon compulsorily acquired for a term of ninety-nine years the lands in question in the present action, and upon application by the rural district council the Irish Land Commission on the 30th July, 1909, made an order fixing the annual rent of the land so compulsorily acquired at £1 4*s.*, and further determining the terms and conditions subject to which the land acquired should be held by the rural district council. This order was made absolute on the 15th June, 1910, and in pursuance of sect. 4 of the Labourers Act, 1885, it operated thenceforward as a lease. Sect. 15 of the Labourers (Ireland) Act, 1883, provides that if within two years after the confirmation of a provisional order under the Act, the district council have failed to make arrangements for the erection of labourers' dwellings, the land shall, in case the person from whom the same was acquired or his heirs or assigns so require, be reconveyed to him or them. When the order was made absolute the rural council took possession of the plot and fenced it in, and paid the yearly rent up to the 25th March, 1913. They failed, however, within two years after the confirmation of the provisional order, to make any arrangements whatever for the erection of a labourer's dwelling on the said plot of land, and on the 2nd September, 1913, the plaintiff, through his solicitor, relying on the provision in sect. 15 of the Act of 1883, wrote to the rural council requiring them to re-convey to him the said plot of land. To this demand the defendant rural district council replied on the 20th September, 1913, stating that they had made every effort to have the cottage erected, but had been unable to procure a contractor. The question submitted by Kenny J. for the decision of the Court was whether the provisions of sect. 15 of the Labourers (Ireland) Act, 1883, applied to land acquired compulsorily for a term of years by a rural district council. If the answer were in the affirmative, the order of the county court judge, and the order of Kenny J. affirming it, were to be reversed, and an order made in terms of the plaintiff's civil bill with costs below and of the appeal. If the answer were in the negative, the order of the county court judge, and the order of Kenny J. affirming it, were to be affirmed with costs below and of the appeal.

E. S. Murphy and *Farrell*, for the plaintiffs:—

Section 4 of the Act of 1885 merely enlarged the powers conferred upon sanitary authorities by the Act of 1883, and therefore the provisions of sect. 15 of the Act of 1883 apply to the acquisition of land generally, whether the land acquired is held in fee or under lease. The statute of 1885 is entitled, "An Act to amend the Labourers (Ireland) Act, 1883." It is to be construed as one with the Act of 1883: Labourers (Ireland) Act, 1886, sect. 2; Labourers (Ireland) Act, 1906, sect. 35. The statutes of 1883 and 1885 consequently make one complete statute which contains a provision for re-conveyance under circumstances such as exist in the present case. The words in sect. 15 of the Act of 1883, "shall be . . . re-conveyed," include, we submit, a re-vesting by surrender in case of a lease. Exactly the same words are used in sect. 16; and, as under that section lands may be taken on lease, the words must include a surrender. "Conveyance" is defined in sect. 2 of the Conveyancing Act, 1881, as including a lease.

[They referred to *Barnett* v. *Cootehill* (*No. 1*) *Rural District Council* (1); and *R.* (*Corporation of Dublin*) v. *Wall* (2).]

Henry K.C. and *Marnan*, for the defendants:—

The subject-matter with which sect. 4 of the Act of 1885 deals is entirely different from that to which sect. 15 of the earlier Act applies. Under the earlier Act the council had only power to acquire the fee. The later Act gives them power to take land upon lease at a rent. Not only is the subject-matter of the two Acts different, but the schemes are different. Under sect. 8 of the Labourers Act, 1906, the Local Government Board have power to allow the district council to let the land.

[They referred to *Waterlow* v. *Dobson* (3); *Mather* v. *Brown* (4); *Ward* v. *Stephenson* (5); and *Betts* v. *Great Eastern Railway* (6).]

E. S. Murphy, in reply.

(1) 46 I. L. T. R. 169.
(2) [1898] 2 I. R. 762.
(3) 27 L. J. Q. B. 55.
(4) 1 C. P. D. 596.
(5) 1 New Sess. Cases 162.
(6) L. R. 8 Ex. 294.

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O'BRIEN L.C. :—

Mr. Justice Kenny, in the case which he has stated, has submitted a net question of law for decision, affecting the construction of the Labourers (Ireland) Acts.

The case came before the learned judge in the form of a civil-bill appeal from an order of the county court judge of the county of Longford, by which the plaintiff's claim for a declaration that the defendants were trustees for him of lands compulsorily acquired by the defendants, and for an order to re-convey them to the plaintiff, was dismissed. The decision of the county court judge was confirmed by Mr. Justice Kenny. The following facts were found :—

The plaintiff was owner in fee of lands in the county of Longford, and these lands were compulsorily taken for the purpose of a site for a labourer's cottage and plot. The land was acquired under the authority of a provisional order of the Local Government Board, which was made absolute on the 3rd March, 1908, and which authorized the taking of the land compulsorily for a term of ninety-nine years. The lease regulating the relation of the parties was settled by the Irish Land Commission by an order of the 30th July, 1909. The date of the provisional order was the 27th December, 1907. The order of the Land Commission was not made absolute until the 15th June, 1910, and from that date only, operated as if it were a lease under the 4th section of the Act of 1885. The defendants went into possession of the land and enclosed it, but the judge found that they had failed to make arrangements for the erection on it of a labourer's dwelling within two years after the confirmation of the provisional order, but that they had paid the yearly rent up to the 25th of March, 1913. The dates are instructive, but so far as the Court is concerned we can only answer the one net question put by the learned judge, namely, whether the 15th section of the Labourers Act of 1883 applies to the compulsory acquisition under the Labourers Acts of land by a rural sanitary authority for a term of years; but I think that attention may properly be directed to the dates, showing how unreasonable a decision different from that of the county court judge and Mr. Justice Kenny might prove in

dealing practically with such cases; for if sect. 15 was to apply in every case, the lease might not be acquired until two years after the confirmation of the provisional order, and that might happen without any default on the part of the sanitary authority. Indeed, there is nothing in this case to show that there was any delay or default in their case; but, as I have said, I am not at liberty to enter into that question, owing to the finding in the case.

Taking the Act of 1883 as it stood, to be regarded by its own provisions alone, it appears to me that sect. 15 could not have been intended to apply to any case of lands taken under lease, if such there should be. No doubt sect. 16 gives power to take lands on lease, and the general powers of the Lands Clauses Act are incorporated; but until the Act of 1885 was passed I am not aware that any cases arose save cases of purchase. Sect. 16, so far as it deals with leases at all, is only controlled by its own general words, that lands "not required for the purpose for which they were acquired," shall be re-conveyed; and sect. 15, if it is to be read as a further restriction as regards time, must, I think, be construed solely with reference to its own words, which speak simply of a re-conveyance—words that do not appear to me to be in this particular section properly applicable to a surrender of a lease. But whether this be right, or whether it be wrong, the Act of 1885, so far as it deals with this subject of leases, appears to me to be self-contained; and the lease which is contemplated by that statute could not, to my thinking, be rationally controlled by sect. 15 of the Act of 1883. The lease is to operate in the same manner as if it were a lease made by a limited owner and confirmed by the Court in pursuance of the Act of 1885, and it is to apply whether the owner is under disability or not.

The general orders made by the Land Commission under the Act of 1885 are elaborate, and the lease, when made by a person under disability, must of necessity be one which in its terms shall be fair and advantageous to all interested in the property. The construction of the Act in this respect cannot be affected by whether or not in the particular case before us the owner was under disability.

The lease can only be made subject to the restrictions affecting

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leases granted by a limited owner in pursuance of the Act; it must exclude mansion house, home farm, or demesne lands; it must take effect in possession within one year after execution; and there must be reserved the best yearly rent which can be obtained without taking anything in the nature of a fine. If the owner was to have power under the provisions of sect. 15 to destroy the lease which had been brought into existence with so much trouble and expense, the destruction would be, in the case of a limited owner, to the detriment of third parties.

Dealing then with the Acts of 1883 and 1885, I am of opinion that the 15th section of the Act of 1883 does not apply to a lease of this kind.

But it is further argued that the Labourers Act, 1886, probably, and the Labourers Act, 1906, certainly, got rid of all difficulty by providing that all these Acts are to be construed as one. It is said that even if the Act of 1885 taken *simpliciter* did not apply all the provisions of the earlier Act, yet this provision that they are to be construed together has that effect. Now it has been pointed out over and over again that the mere fact that statutes are to be read together does not necessarily apply to one of such statutes all the provisions of the other statutes dealing with a different subject-matter. Such a construction would be manifestly ridiculous. The principle is laid down in *R.* (*Corporation of Dublin*) v. *Wall* (1) that the mere fact of two statutes being *in pari materia*, even with an express provision that both shall be construed together as one Act, is insufficient to justify the application to a new subject-matter in the second Act of the provisions of the earlier Act. I consider that the subject-matter of sect. 4 of the Act of 1885 deals with a new and different subject-matter from that dealt with in sect. 15 of the Act of 1883; and that accordingly the mere general reading together of the statutes cannot accomplish what, in my opinion, the Act of 1885 itself did not accomplish. For these reasons, I am of opinion that the question asked by the learned judge, namely, whether the provisions of sect. 15 of the Labourers Act, 1883, apply to land acquired compulsorily for a

(1) [1898] 2 I. R. 762.

term of years under the powers contained in sect. 4 of the Labourers Act, 1885, must be answered in the negative.

CHERRY L.C.J.:—

I concur, though with considerable hesitation. I find it difficult to construe these various sections of the Labourers Acts, and to say with confidence what is the scope and operation of each. I therefore desire to confine myself explicitly to answering the particular question submitted to us by the learned judge, namely, whether the 15th section of the Labourers Act, 1883, applies to the compulsory acquisition of land for a term of years by a rural sanitary authority. It was argued very powerfully by Mr. Murphy that sect. 15 applies not only to the compulsory acquisition of land, but also to the voluntary acquisition. It may be that there is something to be said for that proposition if its application is limited to estates in fee. But I do not desire to express an opinion on that question one way or the other. The net question that arises for decision here is—does this 15th section of the Act of 1883 apply to the curious compulsory lease that is acquired by the guardians under the 4th section of the Act of 1885? I think s. 15 necessarily applies only to a conveyance of land in fee, and cannot apply to taking land under lease, whether voluntarily or compulsorily, under sect. 4 of the later Act. That is the only question we have to decide, and I confine my judgment to answering it.

HOLMES L.J.:—

I concur. The question we have to decide is, whether the 15th section of the Labourers Act, 1883, applies exclusively to land acquired in fee-simple. I do not think it is necessary for the purpose of this case to confine the question to lands in fee acquired compulsorily, and I do not decide that particular question.

I have no hesitation in saying that I think that at the time the Act of 1883 was passed the 15th section was confined entirely to land acquired in fee-simple. That being so, an Act was passed in 1885, extending the powers given by the earlier Act, and enabling lands to be acquired compulsorily for a term of years. That is an entirely different subject-matter from the acquisition of

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lands in fee-simple. The language that would apply to one would not necessarily apply to the other. Indeed, it would seem to me to require specific words to apply the language appropriate to the one class of property to the other. Under the circumstances, I come to the same conclusion as the other members of the Court.

Solicitor for the plaintiff: *C. J. P. Farrell.*

Solicitor for the defendants: *M. M. Kenny.*

J. M.

Appeal. 1915. Dec. 7, 8. 1916. Jany. 19.

BLAKES, TENANTS; SAMPSON, LANDLORD (1).

Landlord and Tenant—Lease made subject to Sub-tenancies—Sub-tenancies determined, and new Sub-tenancies created by Lessee in part originally sublet—Right of Lessee on Expiration of Lease to have fair rent fixed on remainder of Holding—Land Law (Ireland) Act, 1896 (59 & 60 *Vict. c.* 47), *s.* 7, *sub-s.* 3.

Where by a lease lands are demised subject as to a part thereof to sub-tenancies, and such part is sub-let at the expiration of the lease, the lessee is entitled under sect. 7, sub-sect. 3, of the Land Law (Ireland) Act, 1896 (2), to have a fair rent fixed on the remainder of the lands, being in his occupation, notwithstanding that the original sub-tenancies had determined during the currency of the lease, and new sub-tenancies had been created by the lessee, without the consent of the lessor, in the part sub-let at the date of the lease.

APPEAL by the tenants from an order of the Land Commission dismissing the tenants' application to have a fair rent fixed.

(1) Before SIR IGNATIUS J. O'BRIEN L.C., and RONAN and MOLONY L.JJ.

(2) The Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), sect. 7, sub-sect. 3, provides as follows: "Where a part of the property held under one demise is sub-let, and the property was let to the tenant subject to the tenancy of some other person in the part sub-let, the court may, in any case to which sub-sect. 1 of this section does not apply, direct that the part so sub-let shall thenceforth be, or if it is an incorporeal hereditament be treated as, a separate holding, and (unless the application to the court is made on the expiration of a lease) that the same shall be held during the continuance of the tenancy at such rent as the court determine to be the proper proportion of the rent reserved by the demise, and the court may fix a fair rent for the remainder of the property held under the demise, and the Land Law Acts as amended by this Act shall apply to that remainder, as if it were a separate holding; provided that if the landlord so elect, the court shall, in any case to which this sub-section applies, order that the tenant of the part so sub-let shall be the tenant of such landlord as his immediate landlord."

The tenants, Miss Mary S. Blake and Miss Elizabeth C. Blake, had, on the 31st March, 1913, served an originating notice to have a fair rent fixed on the lands of Meelick, in County Galway, described as containing 105A. 1R. statute measure. The application was dismissed by the Sub-Commission on the ground that the holding was not mainly agricultural or pastoral in character.

The tenants served notice requiring the case to be re-heard before the Land Commission. At the re-hearing the landlord relied on three grounds: (1) That the holding was a residential holding. (2) That it was demesne land. (3) That the holding was of much larger extent than 105A. 1R., and that the tenants were not in occupation of the holding, a large part being sub-let. The present report deals only with the last ground.

The case came on for hearing before Mr. Justice FitzGerald, with the assistance of an assessor.

It appeared that by a lease made on the 8th February, 1840, by predecessors in title of the present landlord, to a predecessor in title of the present tenants, certain lands which, for the purpose of the present report may be taken as containing 477A. 2R., statute measure, were demised to the lessee for a term of three lives, or thirty-one years. This lease expired in the year 1912. At the date of the lease part of the lands were in the occupation of sub-tenants, whose sub-tenancies had been created before the lease. Some of these sub-tenants, according to the evidence of Miss Mary S. Blake, whose knowledge dated from 1843, had left in 1847 and 1848, and the lessee had got possession of their holdings, and had kept part in his own possession, and made new lettings of part to other persons. At the date of the application to fix a fair rent about 350 acres were in the occupation of sub-tenants, most of whom had had fair rents fixed against the lessee.

Mr. Justice FitzGerald, in giving judgment, after stating the facts, proceeded to say:—

"The assessor had made a most careful examination of the premises, and he finds that:—(1) The Misses Blake are in occupation of 115 acres statute measure, of which his estimate of the fair rent is £77 3*s.* 7*d.* (2) That the sub-tenancies created since the lease of 1840 extend to 93A. 3R. statute measure, of which his estimate of the fair rent is £28 6*s.* 7*d.* (3) That other sub-

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tenancies in reference to which there is a dispute between the parties whether they were created before or after the lease of 1840, extend to 74A. 1R., on which he estimates a fair rent of £11 4*s*. (4) The other sub-tenancies admittedly created before the lease of 1840 extend to 185A. 3R., on which he places a fair rent of £104 7*s*.; and that in addition there are 8A. 3R. of waste. He has marked all these separately on the map which he has made, from which their position can be seen. As to the part in the occupation of the Misses Blake, he values the land at £65 3*s*. 7*d*., and the buildings at £30 a year. Of the buildings he considers one half belongs to the tenant that is due to work done since the date of the lease. He describes the buildings as" [description set out].

[Mr. Justice FitzGerald then dealt with the questions of whether or not the holding was residential, or was demesne land, and stated his reasons for holding that on neither of these grounds were the tenants precluded from having a fair rent fixed; and proceeded:—]

"As to the third question raised by the landlord, that the tenants are not in occupation of the holding within the meaning of the Land Law Acts, the area of the holding included in the lease of 1840 must be taken as 477A. 2R., statute measure, which was the area actually found by the assessor on his inspection of the premises, and marked by him on the recorded ordnance map.

"Under sect. 7, sub-s. 1, of the Act of 1896, where part of a holding is sub-let, or in the occupation of another person, the tenant can only fix a fair rent if he remains in bona fide occupation of not less than seven-eighths in value of the holding as therein mentioned. In this case the tenants are only in bona fide occupation of 115 acres, of which the value, including the landlord's buildings thereon, is £80 3*s*. 7*d*., while the land of the part sub-let or in the occupation of other persons is 353 acres, and the value thereof is £255 18*s*. 11*d*. Therefore, sub-sect. 1 of s. 7 does not bring the tenants within the Act.

"Then come to sub-sect. 3 of s. 7, which enacts that where the property is let to the tenant subject to the tenancy of some other person in the part sub-let, the Court may in any case to which sub-s. 1 does not apply, direct that the part so sub-let shall thence-

forth be a separate holding, and the Court may fix a fair rent on the remainder of the property. Under this sub-section I may exclude from the holding, and direct to be treated as a separate holding, the part sub-let before the lease of 1840, and which still remains sub-let; this amounts to 185A. 2R., or if you add thereto as most favourable to the tenant the sub-tenancies (about the date of which there is a dispute between the parties) of 74A. 1R., it will make 259A. 3R., and leave a holding of 208A. 3R., of which the Misses Blake are either in physical occupation, or which has been sub-let since the lease of 1840. This holding of 208A. 3R., including the landlord's buildings, is of the value of £112 16*s.* 2*d.*, while the land of the portion sub-let since the lease of 1840 is of the value of £32 12*s.* 7*d.*, that is to say, of the holding of 208A. 3R., between one-third and one-fourth in value is sub-let. There was no evidence given at the hearing of any consent by the landlord to the sub-lettings made since the lease of 1840. From residing in the neighbourhood he probably knew of them, and made no objection to them, as he had no legal power to do so, the lease of 1840 containing no covenant against sub-letting. Knowledge of a landlord of sub-lettings to which he has no power to object is not sufficient: *Maconchy* v. *Robertson* (1).

"I must therefore hold that sub-s. 3 of sect. 7 does not assist the tenants, and that even of the restricted holding under that sub-section they are not in bona fide occupation of seven-eighths in value, and that they were not in bona fide occupation at the expiration in 1912 of the lease of 1840, and no rent has been paid or received since that date.

"I confirm the dismiss of the Sub-Commission, but on the ground of the tenants not being in occupation of the holding within the meaning of the Land Law Acts."

An order was accordingly made by the Land Commission that the order of the Sub-Commission should be varied, and that the tenants' application should be dismissed out of court upon the ground that the tenants were not in occupation of the holding within the meaning of the fair-rent provisions of the Land Law (Ireland) Acts.

(1) 18 L. R. Ir. 483.

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The tenants appealed to the Court of Appeal, asking that the order of the Land Commission Court should be discharged, and that the tenants' application should be remitted to the Land Commission with directions to proceed to fix a fair rent upon the tenants' holding.

A notice was served on behalf of the landlord (who had obtained leave from Mr. Justice FitzGerald to appeal) that on the hearing of the appeal he intended to contend that the appeal should be dismissed, if not on the ground stated in the order of the Land Commission (upon which he relied), then upon the ground that the holding was excluded from the fair-rent provisions of the Land Law (Ireland) Acts as being "demesne," or in the alternative upon the ground that the main object of the letting was for a residence. Both these two last-mentioned points were argued in the Court of Appeal, but it is not considered necessary to deal with them in the present report.

FitzGibbon K.C., and *Patrick Kelly*, for the tenants:—

The sub-lettings do not deprive the tenants of the right to have a fair rent fixed. The case comes within sect. 7, sub-sect. 3, of the Land Law (Ireland) Act, 1896. The effect of that sub-section is that where part of the demised property is sub-let at the date of the application to fix a fair rent, and this part was sub-let at the date of the lease, the tenant is entitled to have a fair rent fixed on the remainder, notwithstanding that in the meantime the tenant had come into possession of lands sub-let at the date of the original tenancy, and had subsequently made a new sub-letting of such lands or portion of them. There is nothing in the sub-section to show that the portion sub-let at the date of the lease is to remain continuously subject to the original sub-letting. It is sufficient if at the date of the application to fix a fair rent the tenant is in bona fide occupation of the same lands which were in his own occupation at the date of the lease. The section is a remedial one, passed in favour of tenants who had been excluded on the ground of sub-letting. An enactment intended to be remedial must be construed so as to give the most complete remedy which the phraseology permits: *Gover's Case* (1). No

(1) 1 Ch. D. 182, per Brett J., p. 198.

suggestion was made and no evidence was given, before the Land Commission, that there had been any sub-letting of land not sub-let at the date of the lease, and Mr. Justice FitzGerald decided the case on the erroneous view that on the true construction of sect. 7, sub-sect. 3, if there was any sub-letting after the date of the lease without the consent of the landlord, whether of lands sub-let at the date of the lease or not, the tenant was precluded from having a fair rent fixed unless the case came within sub-sect. 1 (*b*) of that section.

The assessor had no jurisdiction to take evidence. All evidence should have been given in court.

[They referred to *Flannery* v. *Nolan* (1); *Robinson* v. *Lakefield* (2); *Thomson* v. *Rossmore* (3).]

Henry K.C. (with him *Hugh Kennedy*), for the landlord :—

Under sub-s. 1 (*b*) of sect. 7 of the Act of 1896, the fair rent is fixed on the entire holding, leaving the sub-tenants as tenants to the middleman. It is different under sub-s. 3. That sub-section applies to two classes of sub-lettings—(*a*) leases, (*b*) tenancies from year to year. In the latter case the part sub-let is to be held "during the continuance of the tenancy," at such rent as the Court determine to be the proper proportion of the rent reserved by the demise. The words "during the continuance of the tenancy" refer back to the words at the beginning of the sub-section, "where a part of the property . . . was let to the tenant subject to the tenancy of some other person in the part sub-let," and mean during the continuance of the tenancy of the sub-tenant. Where, therefore, the demise was made subject to a yearly sub-tenancy, the sub-section applies only where such sub-tenancy still continues. In such case, on the expiration of the lease to the middleman, the sub-tenant goes back to his old position of tenant to the head landlord.

It was not intended that where a sub-tenancy was determined during the term of the lease the middleman should have power to create a new sub-tenancy, which, by s. 15 of the Act of 1881, would bind the head landlord at the expiration of the lease. The

(1) 20 L. R. Ir. 537.
(2) [1907] 2 I. R. 130.
(3) 35 Ir. L. T. R. 182.

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effect of the new sub-lettings was to extinguish the sub-tenancies existing at the date of the lease: *Jackson* v. *M'Master* (1).

Under s. 21 of the Act of 1881 the tenant on the expiration of the lease was given a right to have a fair rent fixed only where he was in bona fide occupation of the holding. Sect. 7 of the Act of 1896, by sub-s. 1 (*b*), relaxed this restriction where the sub-lettings did not exceed one-eighth in value of the holding. Sub-s. 3 dealt with the case of sub-lettings existing at the date of the lease, but it cannot have been intended to apply to a case where sub-lettings were subsequently made by the middle-man exceeding the limit permitted by sub-s. 1 (*b*).

The words in brackets in sub-s. 3, "unless the application to the Court is made on the expiration of a lease," govern the rest of the sub-section, and exclude the present case from the provision enabling the Court to fix a fair rent on the remainder of the holding.

The onus lies on the tenants to bring themselves within the sub-section. Even if the construction contended for by them is right, the evidence does not show how far the new sub-lettings comprised the portions sub-let at the date of the lease.

FitzGibbon K.C. in reply.

Cur. adv. vult.

1916. Jan. 19.

SIR IGNATIUS J. O'BRIEN L.C.

In this case the parties have come before this Court on an appeal, and a cross-appeal, from an order of Mr. Justice FitzGerald, the question in its broader aspect being whether or not there was jurisdiction to fix a fair rent on lands which formed part of the property demised by a lease made in the year 1840 which has now expired.

Three questions were involved. On two of them I have no difficulty, and entirely agree with the decision of Mr. Justice FitzGerald. The third is a question of the construction of section 7, sub-sect. 3, of the Land Act of 1896, and upon that my opinion during the course of the argument to a considerable extent

(1) 28 L. R. Ir. 176.

wavered, but the result of consideration has satisfied me that the contention of Mr. FitzGibbon on the only question of difficulty which was argued in this case is right, and that a decision contrary to his contention would neither be in harmony with the general intention of the fair-rent-fixing provisions of our Land Law code, nor would it be fair and reasonable even upon a narrow and technical construction of the section.

In the view which I take it is not necessary to go into the earlier history of this property, and I start with the lease of the 8th February, 1840. There can be no question that the present landlord has succeeded to the title of the lessor in that lease, and that the present tenants have succeeded to the title of the lessees, and that the relation of landlord and tenant existed between them at the date of the expiration of the lease. The case, so far as area is concerned, is complicated by the fact that owing to drainage operations in Lough Derg district it is impossible to reconcile exactly the present area with that of cultivated land at the date of the lease, but fortunately this particular difficulty will not affect the question which arises in the case, and I put it out of consideration.

There is no doubt that at the date of the lease of 1840 the place to some extent bore the appearance of a gentleman's residence. It consisted of a large dwelling-house, and land cultivated in connexion with it. It also seems in the older leases to have been considered part of the demesne of the family of Burke, who had some property in this district. Mr. Justice FitzGerald has decided that, whatever may have been the character of these lands at one time, the holding is not now excluded from the fair-rent-fixing provisions of the Land Acts on the ground of being demesne land. I am entirely in agreement with the conclusion arrived at by him, and he has expressed his view so clearly, and to my mind so accurately, that it is sufficient for me simply to say that I adopt it.

The second question was as to whether or not the holding was residential in its character, and on that question Mr. Justice FitzGerald also decided in favour of the tenants, being of opinion that the area was too large, even if confined to the 115 acres of which the tenants were in physical occupation, to be excluded on

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this ground, and he refers to the case in this Court of *Moonan* v. *Conynghqm* (1), in which Walker L.C., states in reference to a holding of eighty-seven acres that it is larger in area than any holding which has yet been held to be residential. On this point I also agree with Mr. Justice FitzGerald.

The third question is whether the tenants are in occupation of the holding within the meaning of the Land Acts. This turns, as I have said, on sect. 7 of the Land Act of 1896. Mr. Justice FitzGerald points out that as the area of the holding included in the lease of 1840 must be taken as 477A. 2R. statute measure, and as the tenants are only in bona fide occupation of 115 acres, of which the value, including the landlord's buildings, is £80 3*s.* 7*d.*, while the land of the part sub-let or in the occupation of other persons is 253 acres, and the value thereof £255 18*s.* 11*d.*, the case does not come within sub-s. 1 of that section; and he goes on to say:—"Then come to sub-s. 3, of sect. 7, which enacts that where the property is let to the tenant subject to the tenancy of some other person in the part sub-let, the Court may, in any case to which sub-s. 1 does not apply, direct that the part so sub-let shall thenceforth be a separate holding, and the Court may fix a fair rent on the remainder of the property. Under this sub-section I may exclude from the holding, and direct to be treated as a separate holding, the part sub-let before the lease of 1840 and which still remains sub-let; this amounts to 185A. 2R., or if you add thereto as most favourable to the tenant the sub-tenancies (about the date of which there is a dispute between the parties) of 74A. 1R., it will make 259A. 3R., and leave a holding of 208A. 3R., of which the Misses Blake are either in physical occupation or which has been sub-let since the lease of 1840. This holding of 208A. 3R., including the landlord's buildings, is of the value of £112 16*s.* 2*d.*, while the land of the portion sub-let since the lease of 1840 is of the value of £32 12*s.* 7*d.*, that is to say, of the holding of 208A. 3R., between one-third and one-fourth in value is sub-let. There was no evidence given at the hearing of any consent by the landlord to the sub-lettings made since the lease of 1840. From residing in the neighbourhood he probably knew of them and made no objection to them, as he had no legal power to do so, the

(1) [1895] 2 I. R. 1.

lease of 1840 containing no covenant against sub-letting. Knowledge of a landlord of sub-lettings to which he has no power to object is not sufficient: *Maconchy* v. *Robertson*" (1). He holds therefore that sub-s. 3. of s. 7 does not assist the tenants, and that "even of the restricted holding under that sub-section they are not in bona fide occupation of seven-eighths in value, and that they were not in bona fide occupation at the expiration in 1912 of the lease of 1840, and no rent has been paid or received since that date." He accordingly confirmed the dismiss of the sub-commission on the ground of the tenants not being in occupation of the holding within the meaning of the Land Law Acts.

Mr. FitzGibbon contended that the construction put by Mr. Justice FitzGerald on sub-s. 3 of sect. 7 is not the true one. He says that the construction put by the learned judge on the sub-section is, that even though the whole of the part of the property which had been comprised in a sub-letting at the date of the lease was in fact sub-let at the date of the application to fix a fair rent, the tenant would be excluded from the benefit of the sub-section if there had been any break in the continuity of the sub-letting such as happened in the present case, where a number of the original sub-tenants had left the country and the lands comprised in their holdings had been sub-let to other persons. Lest there should be any doubt as to the view taken by Mr. Justice FitzGerald, I asked him if he would kindly communicate with us on the subject. From his reply it is plain that Mr. FitzGibbon has correctly stated the ground of his decision.

I shall deal, therefore, with the construction of the sub-section. Whether or not the facts as to acreage and so forth are such as certainly to entitle the tenants to have a fair rent fixed is another matter.

There are three blocks, so to speak, of sub-tenancies in the lands. There are lands which beyond all question were sub-let at the date of the lease of 1840, and as to which there has been no break in the continuity of the sub-letting. These comprise 185A. 2R. Secondly, there are sub-tenancies created since the date of the lease in holdings which had been sub-let at the date of the lease. These comprise 93A. 3R. Thirdly, there are sub-tenancies comprising 74A. 1R., the date of the creation of which

(1) 18 L. R. Ir. 483.

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is not fixed accurately, but it certainly appears to me that these lands were sub-let when the lease of 1840 was granted. Prima facie therefore, but without determining the question, which this Court has not the materials to do, I should say that if Mr. FitzGibbon's contention as to the construction of sub-s. 3 is acceded to, the Misses Blake would be entitled to have a fair rent fixed. But this Court, as I have said, has not the materials for determining the question of fact, and the case must go back for that purpose to the Commissioners; and while determining this very material question of law, we will send back the case for hearing and determination on a declaration carefully formulated explaining the question of law on which we differ from the learned Commissioner.

Sub-section 1 (*b*) of sect. 7 of the Act of 1896 does not cover the present case, because the land in the occupation of the tenant does not bear the necessary proportion in value to the land sub-let. If the tenants are to succeed, it must be under sub-sect. 3. That sub-section, taken by itself, I now think, does not create any very serious difficulty of construction, and, notwithstanding Mr. Henry's very plausible argument that the construction contended for by Mr. FitzGibbon is inconsistent with some other sections of the Land Acts, I think that this construction, so far from being inconsistent with the other sections, fits in with them perfectly.

The sub-section begins by providing that "where a part of the property held under one demise is sub-let, and the property was let to the tenant subject to the tenancy of some other person in the part sub-let, the Court may, in any case to which sub-sect. 1 of this section does not apply, direct that the part so sub-let shall thenceforth be... a separate holding." I see no reason for giving this first part of the sub-section anything but its plain and literal meaning, that is to say, that if when an application to fix a fair rent comes before the Court, the applicant is in possession of lands forming an ordinary agricultural holding, and it appears that under the demise of these lands he had held other lands which were sub-let at the time of the demise, and are in fact sub-let at the date of the application, these other lands are to be treated as a separate holding, and, as provided by the subsequent part of the sub-section, the Court may fix a fair rent for the remainder of the property held under the demise.

It is contended, however, that this construction cannot be adopted owing to the coercive force of certain words used in the subsequent part of the sub-section, which provides "and (unless the application to the Court is made on the expiration of a lease) that the same shall be held during the continuance of the tenancy at such rent as the Court determine to be the proper proportion of the rent reserved by the demise, and the Court may fix a fair rent for the remainder of the property held under the demise, and the Land Law Acts as amended by this Act shall apply to that remainder as if it were a separate holding." The words in brackets show that some part of what follows is not to apply where the application is made on the expiration of a lease, and it is contended that the effect is that the subsequent part of the sub-section has no application to the present case at all.

During the argument I invited Mr. Henry's attention to the position of tenancies in respect of which fair rents had been fixed against the middleman. In such a case there would, of course, be nothing for the part of the sub-section as to the apportionment of rent to operate on, and I asked him would the provisions as to fixing a fair rent for the remainder apply to all. The only answer he gave was that that was a different case. It is a different case. but it is one which we must take into account in determining the construction of the sub-section. It would certainly be a strong thing to say that it does not apply to such a case at all.

The question was considered, not by this Court, but by the Land Commission, in the year 1901 in *Thomson* v. *Rossmore* (1), and I am not aware that the grounds upon which the decision there was based have ever been disputed. In that case there was a subsisting lease of a holding of 245A. 2R. 21P. The lessees applied in the year 1893 to have a fair rent fixed; but as it appeared that 42A. 3R. 36P. of the holding was sub-let without consent, the application was dismissed. After the passing of the Act of 1896 the lessee again applied, and it was held by the Chief Commission that she was entitled under sect. 7, sub-sect. 3, of the Act to have a fair rent fixed on the part in her occupation, and that the part sub-let should be held during the continuance of the lease at an apportioned part of the rent. That is to say, the sub-section was

(1) 35 I. L. T. R. 182.

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treated as an apportionment section, the apportionment being necessary because the application was made, not on the expiration, but during the continuance of the lease; and the principle on which the Court proceeded was that when the proper proportion of rent to be paid during the continuance of the lease was determined, a fair rent should be fixed on the remainder.

But was the sub-section intended to apply only to the case where an application is made to fix a fair rent during the continuance of a lease? I am of opinion that it applies also to a case where the lease has expired, and that in such case the portion sub-let is to be treated as a separate holding, and a fair rent to be fixed on the remainder; and I think that the words "where a part of the property held under one demise is sub-let, and the property was let to the tenant subject to the tenancy of some other person in the part sub-let," include a case where the part of the property sub-let at the time of the demise is sub-let at the time of the application to fix a fair rent, although there may have been an interval during which it was not sub-let.

Is this construction inconsistent with any of the other provisions of the Land Acts?

The first section in which we find the relation of sub-tenant and superior landlord dealt with is sect. 15 of the Act of 1881. It provides: "If in the case of any holding the estate of the immediate landlord for the time being is determined during the continuance of any tenancy from year to year, whether subject or not to statutory conditions, the next superior landlord for the time being shall, for the purposes of this Act, during the continuance of such tenancy stand in the relation of immediate landlord to the tenant of the tenancy, and have the rights and be subject to the obligations of an immediate landlord."

The determination of the tenancy under that section includes its expiration, and in such case the landlord must take subject to the yearly tenancies, and subject to the rights of the tenants to have fair rents fixed. He cannot get clear possession.

Coming, then, to sect. 7, sub-sect. 3, of the Act of 1896, where there are sub-tenancies existing at the expiration of the lease the rent is not to be apportioned, but the superior landlord becomes the immediate landlord of the portion sub-let, and I think that

the words in brackets in the sub-section, "unless the application to the Court is made on the expiration of a lease," apply merely to exclude the subsequent provision as to apportionment, which, having regard to sect. 15 of the Act of 1881, would not apply to such a case.

No hardship is inflicted on the superior landlord by reason of his not getting up possession at the end of the lease of the part held by sub-tenants, because sect. 15 of the Act of 1881 makes the sub-tenants his tenants; and there is no real difference in result between cases where, during the currency of a lease, an application is made to fix a fair rent and apportion the rent under the lease, and where a fair rent is fixed on its expiration and no apportionment is necessary owing to the operation of the Act itself.

Again, no injustice is done to the superior landlord even in case of ejectment.

Section 12 of the Act of 1896 deals with the case where the middleman makes default in paying his rent and the superior landlord recovers judgment in ejectment for the non-payment. In such case, unless the non-payment was due to non-payment of rent by the sub-tenant, the tenancy of the latter is not affected, except that the superior landlord stands in the relation to him of immediate landlord, so that here again the superior landlord cannot get clear possession.

In the result, I am of opinion that the construction of the sub-section contended for by Mr. FitzGibbon is right, and is not inconsistent with any of the provisions of the Land Acts; and that where part of the property held under the demise was let subject to the tenancy of some other person, and that part is sub-let at the date of the application to fix a fair rent, the fact that there has been a breach in the continuity of such sub-tenancy does not preclude the immediate tenant from having a fair rent fixed on the remainder of the property.

RONAN L.J.:—

I agree with Mr. Justice Fitz Gerald as to the first and second questions.

As to the third, s. 7, sub-s. 3, of the Act of 1898 is made somewhat obscure by including in the same sub-section applications

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pending the currency of a lease and applications at the expiration of a lease. It is necessary to distinguish the two.

I take this simple case first:—L. has let 100 acres to S. for ninety-nine years at £100 per annum. L. then lets 200 acres (of which the 100 form part) to T. for three lives subject to the lease to S. T. applies to fix a fair rent against L. during the lease. The Court then may (1) direct that S.'s 100 acres shall thenceforth be treated as a separate holding; (2) apportion the rent and fix portion on S.'s 100 acres as between L. and T.; (3) fix a fair rent on the remaining 100 acres in T.'s lease. The sub-section plainly applies here.

But if the application is made at the expiration of T.'s lease, S.'s term still continuing, it is plain in such a case that there is no longer any term between L. and T. in S.'s 100 acres, and there is to be no apportionment of the rent, and that there is nothing for the provision to operate on. L. becomes again the immediate landlord of S. It seems to me that in such a case the only real duty of the Court is to fix a fair rent on the part in the possession of the tenant. The law settles the relation between the head landlord and the sub-tenants. The real question therefore is whether the present case comes within the sub-section.

It is plain that as to any lands of which the tenant is in possession at the date of the application, he does not require the sub-section. For instance, if, previous to the application, the interest of S. had expired, or had been determined by an ejectment for non-payment of rent, or otherwise, T. would then have been in possession of the entire. But assume that this had happened, and that T. had re-let S.'s lands to other tenants, and that they were in occupation at the date of the application, how does the matter stand? The sub-section says:—"Where" (A) "part of the property held under one demise is sub-let and" (B) "the property was let to the tenant subject to the tenancy of some other person in the part sub-let." (A) plainly refers to the date of the application. Let us call the part then sub-let X. If the case comes within (B), the section applies. (B) only requires "that the property was let to the tenant subject to the tenancy of some other person" in X.

Mr. Justice FitzGerald says:—"Under this sub-section I may exclude from the holding and direct to be treated as a separate holding the part sub-let before the lease of 1840, and which still

remains sub-let," that is, as was argued before us, in which the original sub-tenancy still continues. Mr. Henry argued strongly that the words "that the same shall be held during the continuance of the tenancy" mean "during the continuance of the sub-tenancy," and that the sub-section as a whole means that the tenant was simply entitled to split the land into two parts—one, of which he originally got possession, and the other, in which there were subsisting tenancies—and that the sub-section only applied where such subsisting tenancies existed at the date of the application.

I am unable to take this view. In the first place, the clause on which he relies does not apply at all to an application on the expiration of the lease. In the next place, "tenancy" in the clause must mean the tenancy of the applicant, as he was under no obligation save under his own contract of tenancy.

The main ground, however, on which I rest my decision is that the language of the section is clear, and only requires that "the property was let to the tenant subject to the tenancy *of some other person*" in the part sub-let at the date of the application.

It seemed to me that if the original letting was of 100 acres to S. at, say, a rent of £100 per annum, it would be hard on the landlord to have the land returned to him with twenty yearly tenants whose aggregate rents amounted to £80. But this is the result of the general alteration of the law by sect. 15 of the Act of 1881, and cannot, in my opinion, affect what I conceive to be the plain meaning of the words of sect. 7, sub-s. 3.

I think that we should make a declaration to the following effect:—On an application to fix a fair rent in any case to which sect. 7, sub-s. 1, of the Land Law (Ireland) Act, 1896, does not apply, the Court may exercise the powers of sect. 7, sub-s. 3, of the said Act, if the portion of the holding of which the tenant is not in possession was let to the tenant subject to the tenancy of some other person in such portion.

MOLONY L.J.:—

Three questions were raised in this case: (1) Was this a residential holding? (2) Were the lands demesne lands? (3) What was the effect of the sub-lettings?

I concur in thinking that the decision of Mr. Justice FitzGerald on the first two questions was right.

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As regards the sub-lettings, it appears that there were some lettings existing at the date of the lease of 1840, and some created since; but there was no evidence to show whether or not the portions of the lands since sub-let were the subject of sub-lettings at the date of the lease. If they were, I am of opinion that sect. 7, sub-sect. 3, of the Act of 1896 applies. On the other hand, existing sub-lettings cannot be disregarded which were created after the date of the lease in respect of portion of the lands in which there was no sub-letting at the date of the lease. I am of opinion that, on the true construction of sect. 7, sub-sect. 3, of the Act of 1896, the right of the tenants to have a fair rent fixed in respect of the portion of the holding in their bona fide occupation is not affected by re-lettings of any portions of the lands comprised in the lease which at the date thereof were sub-let, and to which sub-lettings the demise was subject.

I fully concur in the judgment of the Court, and the declaration read by Ronan L.J.

The Court made the following order:—"The Court being of opinion that on an application to fix a fair rent in any case to which sect. 7, sub-sect. 1, of the Land Law (Ireland) Act, 1896, does not apply, the Court may exercise the powers of sect. 7, sub-sect. 3, of the said Act if the portion of the holding of which the tenant is not in possession was let to the tenant subject to the tenancy of some other person in such portion, doth make no rule upon the matter of this appeal, and doth order that this matter do stand remitted to the Irish Land Commission for further hearing and consideration having regard to the foregoing declaration, with liberty to the landlord and the tenants or either of them to adduce such further evidence *viva voce* or by affidavit as he or they may be advised; and it is ordered that the landlord, Francis Cornelius Sampson, do pay to the tenants, Mary S. Blake and Elizabeth Campbell Blake, their costs (one set) in respect of this appeal up to and including this hearing and order, when taxed by the taxing master."

Solicitors for the tenants: *Francis Kearney & Son.*
Solicitors for the landlord: *Kerin & Hickman.*

J. G. T.

IN RE BOYD'S TRUSTS.

W. J. DEVEREUX AND ANOTHER *v.* MARY I. C. CALM AND OTHERS.

(1915. No. 15.)

M. R.
1915.
Feb. 11.
March 2, 5.
April 27.

Appeal.
Nov. 2, 3.
Dec. 6.

Settlement—Construction—Charge on Real Estate settled—Income for the person for time being entitled to the Real Estate, during certain lives—Corpus, on death of surviving life, for the person then entitled to the Inheritance, and to merge—Trust in event of Sale of Real Estate for Payment of Incumbrances—Voluntary Sale while one of the lives in being—Resulting Trust—Originating Summons—Withdrawal of—Practice.

A testator devised his real estates to the use of the eldest of his three grandchildren, a minor, for life, with remainder to the use of his first and other sons in tail, with remainder to the use of his daughters as tenants in common in tail, and in default of such issue for like estates successively to his remaining grandchildren and their issue. The will contained a name and arms clause, and provisions as to management during minority. The testator died in April, 1859. At the time of his death he was indebted to his sister in a certain sum, which under the provisions of the will became a charge on the real estate. The real estate was already heavily incumbered. By indenture of settlement made in September, 1859, the sister of the testator proceeded to settle the charge, and after reciting that the trustees named in the will were unwilling to act, and that, in consideration of the love and affection which she bore to the grandchildren of the testator, she was desirous that the trustees of the will should act, and in consideration of their assenting so to do, and in order to enable them to manage the said real estates for the benefit of the persons interested therein under the will, and to prevent if possible a sale of the said real estates for payment of incumbrances, she had agreed to vest the charge in trustees upon the trusts thereinafter declared, she, the settlor, thereby assigned the charge to trustees upon trust, after her death, and during the lifetime of the three grandchildren and the survivor of them, to apply the interest of the charge in payment of all or any of the incumbrances affecting the said real estates of the testator, or of the interest thereof, in such manner as the trustees of the will should direct, and in default of any such direction in trust to pay the same to the person for the time being entitled to the real estate of the testator, and it was thereby declared that, after the death of the survivor of the grandchildren, the trustees should stand possessed of the charge in trust for the benefit of the person who should then

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be entitled to the inheritance of the said real estates of the testator under the trusts of the said will, and so that the same, so far as the same was charged upon the said real estates, should sink into and merge in the inheritance thereof; and it was thereby provided that, in the event of the said real estates or any part thereof being sold under a decree of the Court of Chancery, or by order of any other Court of competent jurisdiction, or otherwise, for the payment of the incumbrances affecting the same, during the lifetime of the three grandchildren or any of them, the trust declared in favour of the person for the time being entitled to the said real estates should determine, and the charge should not merge, but should, in case the settlor should be then living, be held in trust for her, and in case she should be then dead, be held in trust for the three grandchildren in equal shares.

The settlor died in 1867. No direction was given by the trustees of the will as to the application of the interest on the charge, and the same was enjoyed by the owner for the time being of the lands. The eldest grandchild died in 1891, leaving an only son and three daughters. The son thereupon became entitled to the lands as tenant in tail, and duly barred the entail. In 1906, he proceeded to sell the lands by voluntary sale under the Land Purchase Acts. He died in 1907, intestate and unmarried, leaving three sisters surviving him. The sale was completed by his personal representative. On the distribution of the purchase money in 1913, the sum secured by the charge was paid to the trustees of the settlement, and all other incumbrances that had affected the lands were paid off. The youngest of the three grandchildren was still alive. The sum was now claimed by (*a*) the personal representative of the son of the eldest grandchild, as the absolute owner of the lands at the time of sale, (*b*) the three daughters of the eldest grandchild, as *personae designatae* under the settlement, (*c*) the surviving grandchild, on behalf of herself and the representatives of the other grandchildren, on the ground that the contingency mentioned in the proviso to the settlement had taken effect, and (*d*) by the personal representative of the settlor.

Held, by the Court of Appeal (1), affirming the Master of the Rolls, that there was a resulting trust of the sum to the estate of the settlor.

Hogg v. *Jones*, 32 Beav. 45, considered and distinguished.

Held, by the Master of the Rolls, that a plaintiff can withdraw an originating summons at his own volition, but on the terms of paying the costs of any defendant who has appeared. Where, however, trustees, who had issued an originating summons for the determination of the question as to who, on the construction of a settlement, was entitled to the settled fund, proceeded to withdraw the summons, and it appeared that a party who had appeared would be thereby damnified, the Master of the Rolls granted an injunction restraining the trustees from dealing with the fund, in order to enable the party so damnified to issue another summons to have the question decided.

(1) The question as to whether the contingency mentioned in the proviso to the settlement had taken effect, was not argued in the Court of Appeal.

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This was an application on behalf of William James Devereux and James Kelly, trustees of an indenture of settlement dated the 17th September, 1859, for the determination of the question as to who, on the construction of the said settlement and in the events that had happened, was now entitled to the capital and income of the sum of £3000 thereby settled, heretofore charged on lands in County Wexford, sold under the Land Purchase Acts, and which said sum had been paid out of the proceeds of such sale by Mr. Justice Wylie to the plaintiffs as such trustees.

The defendants named in the summons were Mary Isabel Caroline Calm, Eileen Lucy Peretti, and Aimee Ashmore De Lange; Maud Tanner, personal representative of Lucy Boyd, the settlor; Isabel Lucy Boyd, and Michael James O'Connor, personal representative of James Jocelyn Boyd, formerly absolute owner of the lands.

The summons was listed for hearing on the 11th February, 1915.

S. L. Brown K.C., for the plaintiffs, applied for liberty to withdraw the summons.

J. E. Walsh, for Maud Tanner, one of the defendants:—

The plaintiffs should not be permitted to withdraw the summons. The question involved is by no means free from doubt. My client is a personal representative merely by the chain of representation. The estate she represents was distributed in 1867, and her beneficiaries are at present unascertained. She has been put on notice of the claim by the action of the plaintiffs, and appeared at their request. Her offer to compromise has been refused. The only alternative course for her is to have the question decided. She wishes to avail herself of the present proceedings. She might be nominated to carry on the proceedings in the name of the plaintiffs: *Samuel* v. *Samuel* (1), or, under the Rules, the Court might nominate her as plaintiff.

(1) 12 Ch. D. 152.

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O'CONNOR M R. :—

I cannot prevent the plaintiffs from withdrawing the summons if they wish, but they can only do so on the terms of paying the costs of any defendants who may have appeared. It will be open to Mr. Walsh to issue another summons, and to use the evidence already filed in support of the present summons. I will grant an injunction meantime to restrain the plaintiffs from dealing with the fund.

S. L. Brown K.C. :—

I do not wish to have the fund tied up, but I do not object to an injunction being granted for a short time.

O'CONNOR M.R. made an order striking out the summons, plaintiffs to pay the costs of the defendant who had appeared, and granted an injunction to restrain the plaintiffs from dealing with the fund, the defendant undertaking to proceed with due diligence; and he put a short stay on the order.

The original summons was subsequently reinstated, on the application of the plaintiffs, and was again listed for hearing on the 2nd March, 1915.

The facts were as follows :—

At the time of his death, hereinafter stated, James Boyd, senior, was entitled in possession to considerable real estates, situated at Rosslare, in the County of Wexford, consisting of a mansion house and demesne, and tenanted lands.

By his will, dated the 15th March, 1858, James Boyd, senior, devised his house and demesne at Rosslare to his sister Lucy Boyd, during her life, and, subject to this life estate, he devised all his real estates and hereditaments in the County of Wexford to Richard John, Earl of Donoughmore, and Philip Jocelyn Newton, and their heirs, to the use of themselves, their executors, administrators, and assigns, for the term of 200 years, and, subject thereto, to the use of his grandson, James Boyd, junior, and his assigns during his life, with remainder to the use of his first and other sons in tail, with remainder to the use of his daughters, as tenants in common in tail, with cross-remainders between them, with remainder to the use of testator's grandson, Charles

Boyd, during his life, with remainder to the use of his first and other sons in tail, with remainder to the use of his daughters as tenants in common in tail, with cross-remainders between them, with remainder to the use of testator's granddaughter, Isabel Lucy Body, and her assigns during her life, with remainder to the use of her first and other sons in tail, with remainder to the use of her daughters as tenants in common in tail, with cross-remainders between them. The will contained a name and arms clause, with a provision for defeasance in the event of non-compliance with it. Testator also declared that the said term of 200 years was limited upon trust, in case his personal estate should be insufficient to satisfy his debts, funeral and testamentary expenses, and the legacies bequeathed by his will, or by any codicil thereto, then out of the rents and profits of the said hereditaments comprised in the said term, or by mortgage or sale of the said premises, or any part thereof, or by any other means, to raise in aid of his personal estate so much money as should be sufficient to satisfy the same debts, expenses, and legacies, and to apply the same accordingly. The will also contained the usual powers of jointuring, and charging for younger children, and a declaration that the trustees should have power, during the minority of any person or persons for the time being entitled to the possession, or to the receipt of the rents and profits of the said estates, to receive the said rents and profits, and to manage the said real estates in manner therein provided. And testator thereby nominated Richard John, Earl of Donoughmore, and Philip Jocelyn Newton, to be trustees and executors of his will. Testator made one codicil, dated the 14th March, 1859, to his said will, whereby he bequeathed certain annuities and a legacy, but did not otherwise alter or revoke his said will.

The testator, James Boyd, senior, died on the 1st April, 1859, and probate of his said will and codicil was duly granted to Richard John, Earl of Donoughmore, and Richard Jocelyn Newton on the 17th September, 1859.

At the time of his death, James Boyd, senior, was indebted to his sister Lucy Boyd in the sum of £4000, secured by his promissory note payable on demand. His real estates were heavily incumbered, and his personal estate was insufficient to discharge

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his debts, funeral and testamentary expenses, and the legacies bequeathed by the will and codicil.

By indenture of settlement, dated the 17th September, 1859, and made between Lucy Boyd, of the first part, James Boyd, junior, an infant under the age of twenty-one years, of the second part, Charles Boyd, and Isabel Lucy Boyd, infants respectively under the age of twenty-one years, of the third part, Walter Hore, and James Michael Vicary of the fourth part, and Richard John, Earl of Donoughmore, and Philip Jocelyn Newton of the fifth part, after reciting the will and codicil of James Boyd, senior; that the testator was, at the time of his decease, indebted to his sister, Lucy Boyd, in the sum of £4000, secured by his promissory note payable on demand, and that it was apprehended that the personal estate of the testator would not be sufficient for the payment of his debts, legacies, funeral and testamentary expenses; that the real estate of the testator was subject to charges and incumbrances to a large amount in addition to the charges and incumbrances imposed thereon by the said will and codicil; that Richard John, Earl of Donoughmore, and Philip Jocelyn Newton were unwilling and declined to act in the trusts imposed upon them by the said will or to prove the same; that Lucy Boyd, in consideration of the affection which she bore to James Boyd, junior, Charles Boyd, and Isabel Lucy Boyd, was desirous that Richard John, Earl of Donoughmore, and Philip Jocelyn Newton should act in the said trusts and prove the said will, and in consideration of their assenting so to do, and in order to enable them to manage the said real estates for the benefit of the persons interested therein under the said will, and to prevent, if possible, a sale of the said real estates for payment of the incumbrances affecting the same, had proposed and agreed to assign over and vest in Walter Hore and James Michael Vicary the said debt of £4000 and all interest then due and to accrue due thereon, and all her right and title thereto, and every part thereof, upon the trusts and for the purposes and subject to the provisoes and declarations hereinafter declared of and concerning the same, and also to enter into such agreement, as was thereinafter contained, not to institute or take proceeding at law against Richard John, Earl of Donoughmore,

and the said Philip Jocelyn Newton as executors of James Boyd (senior), or against either of them, for recovery of the said sum of £4000 or any part thereof; and that Richard John, Earl of Donoughmore, and Philip Jocelyn Newton had, in consideration of said proposal and agreement on the part of Lucy Boyd, consented and agreed to accept and act in the trusts of the said will and to prove the same: it was thereby witnessed that, in pursuance of the before-mentioned agreement, and in consideration of Richard John, Earl of Donoughmore, and Philip Jocelyn Newton assenting to act in the said trusts and to prove the said will, she, Lucy Boyd, did thereby assign and transfer unto Walter Hore and James Michael Vicary the debt or sum of £4000 secured by the said promissory note and interest thereof, and which was charged upon the real and personal estate of the testator under the trusts of the said will, or upon either of them, and all her right, title, and interest, in or to the said debt or sum of £4000, and in or to the said promissory note, together with all interest then due or thereafter to become due thereon, to hold the same to Walter Hore and James Michael Vicary, and the survivor of them, upon the trusts, and to and for the uses, intents, and purposes thereinafter declared, that was to say, upon trust as to £1000, portion of the said sum of £4000 and the interest thereof, and also as to all interest then due upon the said principal sum of £4000, for her the said Lucy Boyd, absolutely, and, as to £3000 residue of the said sum and the interest thereafter to accrue due thereon, upon trust to pay the interest of the said sum of £3000 to, or permit the said Lucy Boyd and her assigns to receive the same during her life, and after her death in trust, during the lifetime of the said James Boyd (junior), Charles Boyd, Isabel Lucy Boyd, and the survivors and survivor of them, to apply the interest of the said sum of £3000 in payment and discharge of all or any of the charges or incumbrances affecting the said real estates of the said testator, or of the interest thereof, in such manner as the said Richard John, Earl of Donoughmore, and Philip Jocelyn Newton, or the survivor of them, or other the trustees or trustee for the time being of the said will, should by any writing under their or his hand direct, and, in default of any such direction, in trust to pay the same to the

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person or persons for the time being entitled to the real estate of the said testator if of the age of twenty-one years, or, if under that age, to his or her guardian or guardians for his or her maintenance or advancement: And it was declared that, from and after the death of the survivor of the said James Boyd (junior), Charles Boyd, and Isabel Lucy Boyd, the said Walter Hore and James Michael Vicary should stand possessed of the said sum of £3000, and of the interest thereof, and of the securities therefor, in trust for the benefit of the person or persons who should then be entitled to the inheritance of the said real estates of the said testator under the trusts of the said will, and so that the same so far as the same was charged upon the said real estates should sink into and merge in the inheritance thereof; and it was provided that, in the event of the said real estates or any part thereof being sold under a decree of the Court of Chancery, or by order of any other Court of competent jurisdiction, or otherwise for the payment of the incumbrances or charges affecting the same or any of them, during the lifetime of the said James Boyd (junior), Charles Boyd, or Isabel Lucy Boyd, or of any or either of them, then the trust thereinbefore declared in favour of the person or persons for the time being entitled to the said real estates should cease and determine, and the said sum of £3000 should not sink into or merge in the inheritance of the said estates in manner thereinbefore provided, but the said sum of £3000 and all interest thereafter to accrue due thereon should, in case the said Lucy Boyd should be then living, be held in trust for her, her executors, administrators, and assigns, and, in case the said Lucy Boyd should be then dead, be held in trust for and become payable and be paid in equal shares and proportions to and amongst the said James Boyd (junior), Charles Boyd, and Isabel Lucy Boyd, their respective executors, administrators, and assigns, equally between them as tenants in common.

The deed also contained (inter alia) the following provisions:—A covenant by Lucy Boyd and Walter Hore and James Michael Vicary with Richard John, Earl of Donoughmore, and Philip J. Newton and the survivor of them, that she the said Lucy Boyd, her executors or administrators, or they the said Walter Hore and James Michael Vicary, or the survivor of them,

his executors or administrators, their or his assigns, would not institute or take any proceedings at law for recovery of the said sum of £4000, or any part thereof, or of the interest thereof, against Richard John, Earl of Donoughmore, and Philip Jocelyn Newton or against the survivor of them as executors or executor of James Boyd (senior), or against their or either of their heirs, executors, or administrators; and a proviso that nothing therein contained should hinder or prevent Lucy Boyd, her executors, administrators, or assigns, or Walter Hore and James Michael Vicary, or the survivor of them, his executors, administrators, their or his assigns, from instituting proceedings in equity to administer the real or personal estate of the testator, James Boyd (senior), or for the payment or recovery out of the real or personal estate of the testator of the said sum of £4000 and every part thereof and of the interest thereof.

Lucy Boyd, the settlor, died on the 14th March, 1867, having by her will appointed Georgina Thomasina Bagenal and James Michael Vicary her executors. Probate of the said will was duly granted to James Michael Vicary.

The sum of £1000, to which Lucy Boyd was entitled under the indenture of the 17th September, 1859, was duly paid to her executor, and the said lands were duly released therefrom.

James Boyd (junior), the eldest grandchild, died on the 23rd April, 1891, leaving James Jocelyn Boyd, his only son and heir-at-law, him surviving, who thereupon became entitled to an estate in tail male in the said lands settled by the will of James Boyd (senior), which he duly barred.

Charles Boyd, the second grandchild, died in 1904, in America, intestate.

An absolute order for sale of the said lands was made by the Land Judge on the 3rd December, 1890, in the matter of a petition for sale entitled "James Boyd, owner; the Scottish Widows Fund and Life Assurance Society, petitioners." The said petition for sale was dismissed by order dated the 21st December, 1906, no part of the said lands having been sold thereunder.

In the year 1906, James Jocelyn Boyd lodged an Originating Application with the Irish Land Commission for the sale to the tenants of the said lands, under the Land Purchase Acts, and

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also for the sale of certain other lands to which he was entitled as tenant in tail under a prior settlement. The said lands settled by the will of James Boyd, senior, were set out as the lands for sale in Part I of the First Schedule to the said Originating Application, the said other lands being set out in Part II of the said First Schedule.

James Jocelyn Boyd died intestate and without having been married, on the 22nd March, 1907, leaving his three sisters, Mary Isabel Caroline Calm, Eileen Lucy Peretti, and Aimee Ashmore De Lange, his co-heiresses at law, him surviving. Letters of administration of his personal estate were duly granted to Michael James O'Connor.

The purchase-money of the entire estate for sale was advanced on the 10th July, 1913, the lands being vested in the purchasing tenants, and the order attaching claims to the purchase-money being made on the same day. On the ruling of the Final Schedule of Incumbrances, the purchase-money of the lands set out in Part I of the said First Schedule to the Originating Application was distributed at Part I of the said Final Schedule, and the purchase-money of the lands set out in Part II of the said First Schedule was distributed at Part II of the said Final Schedule. The said charge of £3000 was set out at Part I, and Mr. Justice Wylie directed that a sum of £3000 should be placed to the separate credit of the trustees of the indenture of 17th September, 1859, but refused to decide who was entitled to the interest on, or corpus of, the said sum. The purchase-moneys available for distribution at Part I of the Final Schedule were insufficient to discharge all the claims appearing at Part I, but all the incumbrances that had affected the entire estate were paid off out of the entire purchase-moneys and bonus.

Walter Hore, one of the trustees of the indenture of the 17th September, 1859, had died in the lifetime of James Michael Vicary, the second trustee and also executor of Lucy Boyd. James Michael Vicary died on the 23rd May, 1895, having made a will, probate of which was duly granted to Joseph T. Tanner, the executor therein named. Joseph T. Tanner died on the 16th July, 1905, having made a will, probate of which was duly granted to his widow, Maud Tanner, the executrix therein

named. William James Devereux and James Kelly were duly appointed trustees of the indenture of the 17th September, 1859, and the said sum of £3000 was then paid out to them as such trustees.

The trustees of the will of James Boyd, senior, never gave any direction as to the application of the interest on the sum of £3000, with the result that it had been enjoyed by the successive owners for the time being of the said lands settled by the said will.

Isabel Lucy Boyd, the third grandchild, was still living.

James Sealy for the plaintiffs:—

The Solicitor-General (*James O'Connor K.C.*) (with him *Devitt*) for the defendant Michael James O'Connor, personal representative of James Jocelyn Boyd:—

The proviso in the settlement that in the event of the real estates being sold under a decree of the Court of Chancery or by order of any other Court of competent jurisdiction or otherwise for payment of incumbrances the £3000 should be held in trust for Lucy Boyd if then living, or if then dead, for the three grandchildren, does not apply. The contingency contemplated was a compulsory sale for payment of incumbrances. The only suggestion of compulsion in the case was removed long before the sale in the Land Commission, which was a voluntary sale by the owner of the estate, when the petition for sale in the Land Judge's Court was dismissed in 1906 for delay; that was by reason of the mortgagees not wishing to proceed to a sale under the order. The onus of proof is on those who say that the contingency has happened. James Jocelyn Boyd was absolute owner of the estate at the time of his death. He had become the absolute owner of the charge when he disentailed, and his personal representative is entitled to the fund.

S. L. Brown K.C. and *Garrett Walker K.C.* for the defendants, Mary Isabel Caroline Calm, Eileen Lucy Peretti, and Aimee Ashmore De Lange:—

The fact that a voluntary sale of the lands has taken place makes no difference as to the rights of the owners of the charge at the time of the sale. Under sect. 16 of the Irish Land Act,

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1903, the claims of all persons who are interested in the lands attach to the purchase-money. The contingency contemplated by the proviso has not happened, as the sale was by the owner of the lands: *In re Bateson's Estate* (1), where Bewley J. explains the difference between a sale by the Land Judge for payment of incumbrances and a voluntary sale by a landlord to his tenants through the medium of the Irish Land Commission. The provision in the settlement that the £3000 should "sink into and merge in the inheritance" means that that charge should go to the persons who were then the owners of the lands. The case must be dealt with as if the purchase-money were the lands.

Apart from sect. 16 of the Act of 1903, the gift takes effect, though there can be no merger in the inheritance by reason of the lands being gone. The gift does not fail because the particular object cannot be carried out: *Clancy* v. *O'Callaghan* (2), per Porter M.R. Here there is a gift to particular persons, namely, the persons entitled to the inheritance of the real estates of James Boyd, senior, under the trusts of the will. If there had been no disentail by James Jocelyn Boyd, his sisters would now have been entitled as tenants in common in tail. When chattels or other personal estate are settled by reference to real estate, the question of disentail is not considered: *Hogg* v. *Jones* (3), where there was a gift of heirlooms by reference to the possession of real estate, and it was held that the heirlooms went to a person who was in fact deprived of the possession of the real estate by disentail. In *In re Petre's Settlement, Legh* v. *Petre* (4), where a power of revocation was given to Philip Lord Petre in case he should become entitled to the actual possession of the Petre estates under the limitations of the Petre settlement, it was held that, notwithstanding the assignment by him of his life estate to the prior tenant for life, he became on the death of the prior tenant for life entitled to the actual possession of the Petre estates under the limitations in the Petre settlement, and that his power of revocation had consequently arisen. The daughters of James Boyd, junior, are accordingly entitled as *personae designatae* under the settlement.

(1) [1895] 2 I. R. 559, 570.
(2) [1897] 1 I. R. 290, at p. 294.
(3) 32 Beav. 45.
(4) [1910] 1 Ch. 290, 296.

Serjeant Matheson K.C. and *A. V. Matheson*, for the defendant Isabel Lucy Boyd (appointed by the Master of the Rolls to represent the personal estate of James Boyd, junior, and Charles Boyd) :—

A sale for payment of incumbrances need not be a sale *in invitum*; the motive for the sale cannot be inquired into, and if it resulted in payment of incumbrances, then it was a sale for payment of incumbrances. The sale in the Land Commission Court involved payment of incumbrances. Isabel Lucy Boyd was one of the special objects of the bounty of the settlor, as is shown by the recitals in the deed. The inheritance has gone to the tenant purchasers, and therefore the charge cannot sink into the inheritance. The words "or otherwise" mean "in any other way." That could only be by a voluntary sale. The intention of the settlor was, that if there was a sale resulting in the payment of incumbrances, and she was alive, she was to get back her money. In 1890 the Scottish Widows' Fund and Life Assurance Society presented a petition for sale of the estate, but they were paid off by a Mr. O'Farrell, who was to be paid out of the proceeds of the sale of the property. It is so stated in an affidavit of Mr. M. J. O'Connor, filed in the Land Commission matter. The money was lent by Mr. O'Farrell on Mr. O'Connor's undertaking to pay him out of the purchase-money. The proceeding in the Land Commission was practically a continuation of the proceedings in the Land Judge's Court. James Jocelyn Boyd was entitled to the interest on the £3000, but that interest ceased to be payable to him at the date of the vesting orders by virtue of the deed. The charge attached to the lands, and therefore to the purchase-money: sect. 16 of the Irish Land Act, 1903. The trustees of the settlement are the persons to enforce the claim for the £3000 against the purchase-money. The idea of the settlor was that the lands should not be sold except for payment of incumbrances. If "otherwise" is to be read as referring to a sale *ejusdem generis*, a sale in the Land Commission is as near to a sale by decree of the Court of Chancery as can be; it is a sale by order of a Court of competent jurisdiction. The contingency contemplated by the proviso has taken effect.

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J. E. Walsh for the defendant Maud Tanner, personal representative of Lucy Boyd, the settlor:—

There is ample evidence to be found in the settlement itself as to what was the intention of the settlor. It is only in the absence of such clear intention that it would become necessary to apply the principles which have been applied in *Hogg* v. *Jones* (1) and the other cases cited, and which may have been properly applicable to the peculiar facts of those cases. The intention of the settlor here fully appears from the recitals in the deed, her paramount intention being to enable the estates to be preserved in the Boyd family as realty during the lives of the three grandchildren. The trusts declared, both as to the application of the interest on, and the ultimate destination of the corpus of, the charge, are only consistent with the continued existence of the real estate as such. By reason of the sale, there is now no person "entitled to the inheritance," and no "inheritance" in which the charge can merge, and *a fortiori* there cannot be on the death of Isabel Lucy Boyd. Even if purchase-money can be deemed to represent the "inheritance," there was no residue, as the entire purchase-money was exhausted in paying the charges that affected the lands, and accordingly there is now no person "entitled to the inheritance." The proviso must be read in conjunction with the declared intention "to prevent if possible a sale of the said real estates for payment of the incumbrances affecting the same." The only class of sale contemplated by the proviso was a forced sale for the payment of incumbrances and charges. A voluntary sale by an owner under the Land Purchase Acts, such as has taken place here, does not come within the category of sales contemplated by the proviso, and is contrary to the clearly expressed intention of the settlor. To accede to the contention submitted on behalf of the representative of James Jocelyn Boyd, and on behalf of his three sisters, would be, in effect, to rectify the deed by inserting provisions which are not there. The Court will not interfere to reform a voluntary settlement against the settlor: *Weir* v. *Van Tromp* (2); *Milroy* v. *Lloyd* (3). The effect of the order attaching claims to

(1) 32 Beav. 45.
(2) 16 T. L. R. 531.
(3) 4 De G. F. & J., at p. 274.

the purchase-money, under sect. 16, sub-s. 1, of the Act of 1903, was to attach to the purchase-money the claim in respect of the charge subject to trusts which had *ipso facto* failed. The later proviso that nothing in the deed was to prevent the executors of the settlor from administering the estate of James Boyd, senior, for recovery of the sum, showed that the settlor contemplated the possibility of the sum coming back to her estate. It is submitted that in the events that have happened there is a resulting trust of the sum to the estate of the settlor.

Garrett Walker K.C., in reply :—

We ask in the alternative for an order that the income of the £3000 is payable to the three daughters of James Boyd, junior, and the survivor, during the life of Isabel Lucy Boyd, as being the persons who would be entitled to the lands under the trusts of the will if the trusts had not been disturbed, and that on the death of Isabella Lucy Boyd the £3000 is to be the property of the person or persons who would have been entitled at that time to the inheritance of the real estates under the trusts of the will, if such estates had not been disentailed or sold or otherwise disposed of. The gift over under the proviso must be construed strictly. The class of sale there referred to was a sale *in invitum*, which might be made by a mortgagee out of Court. It is immaterial that it is a voluntary settlement. Rectification of the deed is not asked. The deed was only voluntary in part. It was also made in consideration of the trustees agreeing to carry out the trusts of the will for the benefit of three minors.

It is immaterial that the lands were disentailed or sold; the point is to see who, under the trusts of the will, would have been entitled. The three daughters of James Boyd, junior, would have been tenants in tail in possession if the lands had been allowed to devolve under the will: *Hogg* v. *Jones* (1); *Legh* v. *Petre* (2). *Hogg* v. *Jones* (1) is recognized in *In re Earl of Caledon* (3), which seems to show that an order as to the income of the £3000 is all that can be asked for at present. There were

(1) 32 Beav. 45.
(2) [1910] 1 Ch. 290.
(3) [1915] 1 Ch. 150.

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two instruments in that case, as here. *Potts* v. *Potts* (1) is rather like this case in some respects. It is referred to in *In re Earl of Caledon* (2), as is also *Cox* v. *Sutton* (3).

As to sect. 16 of the Irish Land Act, 1903, it is not necessary to argue what the effect of it is, save to say that it cannot affect interests in a charge on land.

As regards the contention that there is a resulting trust for the settlor, the authorities I have referred to show that the actual condition of the estate is immaterial; the estate may go elsewhere, but the fund goes to the persons designated by the will. It would require very strong words to show that the intention of the settlor was that the person to take the fund was to be in actual possession of the estates.

Cur. adv. vult.

April 27.

O'CONNOR M.R.:—

This case involves the construction of an indenture of settlement, dated 17th September, 1859, by which a sum of £3000 was vested in trustees upon certain trusts. This sum was charged upon the estate of James Boyd, senior, and it is necessary for the proper appreciation of the settlement to read his will, because it was the occasion of the settlement.

James Boyd, senior, was the owner of lands situate at Rosslare, in the County of Wexford, consisting of a house and demesne, and tenanted lands. [His Lordship referred to the will of James Boyd, senior.]

It is evident from this will that the testator's main object was to keep the estate in his family, and that it should always be associated with the name of Boyd. The testator died on the 1st April, 1859, and probate of his will was granted on the 17th September, 1859, to the Earl of Donoughmore and Philip Jocelyn Newton.

This brings us to the settlement now before the Court for construction. It will be seen from it that the executors had almost resolved to renounce probate, and to disclaim the trusts of

(1) 9 I. E. R. 577; 1 H. L. C. 671.

(2) [1915] 1 Ch. 150.

(3) 25 L. J. Ch. 845.

the will, fearing that it would be impossible to avoid a sale of the estates. It was for the purpose of inducing them to take the burden of administration that the settlement was executed. [His Lordship referred to the settlement of the 17th September, 1859.]

The events which have happened since the execution of the deed were these:—Lucy Boyd died in the year 1867. The sum of £1000, part of the sum of £4000, was paid to her executors in the year 1873, and the lands were released therefrom. James Boyd, junior, the first tenant for life, died in 1891, and James Jocelyn Boyd, his only son, became entitled as tenant in tail. He barred the entail by a disentailing deed, dated the 27th August, 1904, and died intestate and unmarried on the 22nd March, 1907, whereupon the estate devolved upon his three sisters, as co-heiresses, viz., Mary Isabel Caroline Calm, Eileen Lucy Peretti, and Aimee Ashmore De Lange. They are parties to the proceedings. Charles Boyd, the second tenant for life, died in 1904, and Isabel Lucy Boyd is still alive.

The Scottish Widows Fund and Life Assurance Society, as mortgagees, presented a petition to the Land Judge for the sale of the estates, and an absolute order for sale was made on the 3rd December, 1890. The proceedings, however, were allowed to remain in abeyance, and ultimately the case was entered in what is called the Judge's Delay List, and the petition was automatically dismissed by order dated 21st December, 1906.

On the 15th May, 1906, James Jocelyn Boyd lodged an originating application with the Irish Land Commission for the sale of the estates to the tenants, and the sale was carried through after his death. The final schedule of incumbrances in the Land Purchase matter has been ruled, and Mr. Justice Wylie directed that a sum of £3000 should be placed on deposit to the credit of the matter, and the separate credit of the trustees of the settlement, dated the 17th September, 1859, leaving it to this Court to decide who is entitled to the fund.

In these circumstances several rival claims to the fund have been made. The co-heiresses of James Jocelyn Boyd claim to be entitled to the fund as the owners of the lands when the sale was completed. A similar claim is made by the executor of James Jocelyn Boyd. It is also claimed that

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on the death of Isabel Lucy Boyd the fund will become divisible in equal shares between the personal representatives of James Boyd, junior, Charles Boyd, and Isabel Lucy Boyd; and, lastly, a claim to the entire fund is made by the personal representatives of Lucy Boyd.

A close consideration of the deed reveals a most difficult question of construction. Going back to the deed, it will be seen that, on the death of Lucy Boyd, the first trust was during the lifetime of James Boyd, Charles Boyd, and Isabel Lucy Boyd, and the survivors and survivor of them, to apply the interest of the £3000 in payment and discharge of all or any of the charges or incumbrances affecting the lands or of the interest thereof in such manner as the trustees of the will should direct, and, in default of direction, in trust to pay the same to the person for the time being entitled to the lands. The trustees never gave any direction as to the interest on the £3000, with the result that it was enjoyed by the owner of the lands for the time being. The next trust was that after the death of the survivor of James Boyd, Charles Boyd, and Isabel Lucy Boyd the trustees should hold the sum of £3000 and interest in trust for the benefit of the person or persons who should then be entitled to the inheritance of the real estates of the testator under the trusts of the will, and so that the same so far as charged on the real estates should sink into and merge in the inheritance thereof. These trusts contemplated the preservation of the estate in specie, and had no application to any other state of circumstances. Once the lands, as lands, disappeared, the trusts became inapplicable. This was recognized by the settlor, because the declaration of trust I have mentioned was followed by a proviso declaring what should happen on a sale of the lands. The proviso has already been read. Its meaning has been discussed, and by one side it is argued that it only refers to a sale under pressure from incumbrancers, and by another side it is argued that it refers to any sale whatever. The whole proviso is governed by the words "for the payment of the incumbrances or charges," but it is argued that any sale, no matter what the motive, would result in payment of incumbrances, and consequently that these words do not prevent the application of the proviso to a sale made under the Land Purchase Acts. I think

that the meaning of the settlement may be best ascertained by going back to the date of the settlement and considering how the law then stood, and how it affected incumbered estates. The Incumbered Estates Commissioners had been selling incumbered estates for some years, and their operations were present to the minds of all owners of property. In the year before the execution of the settlement the Landed Estates Court Act was passed, by which the commissioners were replaced by judges, to whom an extended jurisdiction was given for the sale of incumbered or unincumbered estates. Now, this was undoubtedly the "Court of competent jurisdiction" referred to in the proviso. This is exactly what one would conclude from the prominent place which the Landed Estates Court occupied at the time, but no room is left for doubt, because the words "for payment of the incumbrances or charges," are exactly the words used in the 64th section of the Landed Estates Court Act, with the addition of the words "or satisfaction." A sale in the Landed Estates Court was undoubtedly uppermost in the mind of the draftsman. But what was "otherwise" intended to cover? Now, I do not think that it could have been intended to cover a sale by an owner outside the Landed Estates Court. The sale apprehended by Lucy Boyd, and which she sought to prevent, was one which would defeat the limitations of the will of James Boyd, and should therefore take place while the lands were in settlement. As the law stood at the time, I do not think that a limited owner could sell out of Court for the discharge of incumbrances. A mortgagee could sell out of Court by exercising a power of sale. Therefore, I think that "otherwise" had no application to a sale by an owner outside the Landed Estates Court, and could only apply to a sale by a mortgagee. This being so, a sale under the Land Purchase Acts, which is not a sale by a Court, but a sale by an owner (a mode of sale not contemplated by the draftsman), does not come within the proviso under which the £3000 would go to James Boyd, Charles Boyd, and Isabel Lucy Boyd, in equal shares.

If I am right in the conclusion I have arrived at as to the meaning of the proviso, there has been no trust at all declared to meet the events which have happened. The direction to apply the interest in payment of the incumbrances affecting the lands,

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and in default to the person entitled to the lands for the time being, and the direction that the principal sum should sink into the inheritance, show that the trusts declared before the proviso were all dependent on the continued preservation of the lands. I am, therefore, of opinion that there was a resulting trust for Lucy Boyd, and that her personal representative is now entitled to the fund.

W. L.

Nov. 2, 3.

The defendants, Mary I. C. Calm, Eileen L. Peretti, and Aimee A. De Lange, and the defendant Michael J. O'Connor, appealed. No appeal was taken by the defendant Isabel Lucy Boyd (1).

S. L. Brown K.C. and *Garrett Walker K.C.* (with them *James Sealy*), for the appellants Mary I. C. Calm, Eileen L. Peretti, and Aimee A. De Lange.

The Solicitor-General (*James O'Connor K.C.*) and *Devitt*, for the appellant Michael J. O'Connor.

W. M. Jellett K.C. and *J. E. Walsh*, for the respondent Maud Tanner.

The arguments were similar to those before the Master of the Rolls, reported *ante*, p. 131, except that the question as to whether the contingency mentioned in the proviso to the settlement had taken effect was not argued.

Dec. 6.

O'BRIEN L.C.:—

In this case, after careful consideration, I find that I cannot yield to the learned and ingenious arguments presented by counsel for the appellants, and I have come to the conclusion that the Master of the Rolls' view was right, and should be affirmed.

In all cases of construction of wills or documents I conceive it to be my primary duty to examine the document (in the present case, the deed of the 17th September, 1859), and see if on its own language, and without straining or altering any of it, an

(1) In the Court of Appeal, before O'BRIEN L.C., and RONAN and MOLONY L.JJ.

intelligent and satisfactory interpretation can be put on it, applicable to the events which have happened and which render a construction of the instrument by a Court necessary. If I be satisfied, as I am satisfied, that the construction of this document is reasonably clear, it is not permissible to search in other cases to see if contradictions and difficulties which arose in them create contradictions or difficulties in the case under consideration.

All rules of construction, even the most technical, have to yield to the expressed declarations of a testator or settlor. In the present case Mr. Brown K.C. pressed in the strongest manner that the case of *Hogg* v. *Jones* (1) contained a principle of construction which must of necessity be intruded into the consideration of the document before us. In the view which I take of this document I do not really have to consider whether the decision in *Hogg* v. *Jones* (1) is in its entirety right or wrong, if I am satisfied that the deed leaves no real reason for doubt. Difficulty, no doubt, there is, but the difficulty is met and solved within the four corners of the instrument.

The objects which Lucy Boyd had in executing this indenture of the 17th September, 1859, are clearly stated in the recitals, and were three-fold: they were, first, to induce certain persons to act in the trusts of the will of James Boyd, senior; secondly, to enable these persons to manage the real estate of that testator for the benefit of persons interested under the will; and thirdly, to prevent if possible a sale of the estates for payment of the incumbrances affecting them. The third was the dominant motive, the other two were only subsidiary, and Lucy Boyd, while hoping presumably for the fulfilment of her intention so far as rules of law permitted, also contemplated the failure of this third and cardinal object. So far as the recital is concerned, she seems to have intended to deal with every case where it became impossible to keep the estate in the family within the limits of time measured by the lives of then living persons. It was contended in the Court below that the operative part of the instrument carried out in its proviso an effective vesting in the three persons named therein—namely, James Boyd,

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Charles Boyd, and Isabel Lucy Boyd, in the event of any sale taking place of the estates, and the impossibility of keeping them in the family thereby arising. With some hesitation, however, I think the view of the Master of the Rolls on the construction of the proviso was correct, and that the provisions so far as they are expressed only extend to the case of a sale by a Court, whether put in motion by an incumbrancer or by a tenant for life under the provisions of the Incumbered Estates Court Act, or by a sale *in invitum* by an incumbrancer, and do not include the case which has occurred of a voluntary sale under the provisions of the Irish Land Purchase code by an owner who had disentailed. This construction of the Master of the Rolls, however, was not challenged in the argument of the appeal, and its assumption in no way affects the general question argued. It does not, however, seem to me that because the settlor omitted to make provision for the case of a sale such as has occurred, the document must be construed as of necessity vesting this £3000 in some person irrespective of the conditions which the prior part of the deed imposed, or that we are compelled to import into the deed an intention (to my mind purely fictitious) that she intended exhaustively to provide for a devolution of the charge of £3000 limited by references to certain *personae designatae*, namely, those who under the trusts of the will take the inheritance, but who, under the circumstances that have arisen, never could by any possibility take it.

The intention as to what is to happen to the £3000 after the death of the survivor of James, Charles, and Isabel Boyd, seems to me to be expressed in reasonably clear language. The provision is that the trustees shall stand possessed of the £3000 "in trust for the benefit of the person or persons who shall then be entitled to the inheritance of the said real estates of the said testator under the trusts of the said will, and so that the same so far as the same is charged upon the said real estates shall sink into and merge in the inheritance thereof." This provision with regard to the charge sinking into and merging in the inheritance controls the whole sentence, and I fail to understand how the deed can be construed as giving the £3000 to a person who never can become entitled to the inheritance, and under conditions by which it is impossible

for the charge to sink into and merge in the inheritance thereof for the benefit of any member of the family. If a merger was to take place at all, it would have to operate for the benefit of a total stranger. This is the last thing that by any process of construction can be imported into the deed, and as this sinking into and merging in the inheritance for the benefit of a member of the family who should become entitled to the inheritance of the real estates cannot be carried out, I think that there is a failure of the trust in the event which has happened, and there must be, as the Master of the Rolls has held, a resulting trust for the benefit of those who would take the personal estate of Lucy Boyd.

It is said, however, that the Court must not construe the document in this plain way on its own language, and that it practically must delete this provision with regard to sinking into and merging in the inheritance; and the theory was suggested that these words are to be treated as being nothing more than vague and possibly decorative words, having no real meaning at all, and that on the authority of *Hogg* v. *Jones* (1) we are to construe the document solely upon the first part of the clause, and hold that some person who at an earlier date became entitled to the inheritance took as a *persona designata*. The case of *Hogg* v. *Jones* (1) is of course one which must command the utmost respect, being a decision of a judge of the great eminence of Lord Romilly; but I think, without disrespect, I am at least entitled to say that, at any rate, on the actual will in that case, it went very far in disregarding the words "person who should be in the actual possession and enjoyment of the freehold estates." It was not, however, pressed this length by Mr. Brown; but he contended that it is an authority applicable to the present case because of the words "who shall then be entitled to the inheritance" in the present case being at least as strong as the words in *Hogg* v. *Jones* (1), leaving out "actual possession and enjoyment." Whatever force this argument has, I consider it is negatived by the words which to me contain the real solution of the question. Whether *Hogg* v. *Jones* (1) did or did not go too far is not material, when I am satisfied that the words in that case so far as they show intention

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have not a real resemblance to the words of Lucy Boyd in this deed. Even the subject-matter, namely a piece of plate, in that case marks a difference. The reason why this matter of merger is so clearly dealt with by Lucy Boyd is because she is dealing with a charge on lands; it would be mere nonsense if applied to a chattel; but the words are there, they are applicable to something which may happen, if so directed by a settlor, to a charge on lands; and then I find that the thing which is contemplated cannot possibly happen; the condition cannot possibly be fulfilled; the intention clearly expressed can never be carried out; there can only be one result.

I decline to apply *Hogg* v. *Jones* (1). It may be my fault, but it does not seem to me to be applicable, and I am not compelled to introduce into this deed a construction which I am satisfied it does not bear.

RONAN L.J.:—

The facts of this case are stated in the judgment of the Master of the Rolls.

He has decided that the proviso has not taken effect, and there is no appeal against that decision by the parties who would have been entitled to the fund if the proviso had taken effect.

I agree with the Master of the Rolls that a sale in the Landed Estates Court was in the mind of the draftsman; he even goes so far as to say "uppermost" in his mind.

It must be remembered, however, that a tenant for life, and *à fortiori* a tenant in tail, could petition for a sale of the fee so far as was necessary for the discharge of the incumbrances on the fee, and there can, I think, be no doubt that this was a usual proceeding: Madden, Landed Estates Court Practice, p. 43. There can be no doubt that an order for sale on such a petition would be within the proviso, and therefore the proviso is not limited to sales brought about by the action of the incumbrancers, but extends to such a sale as I have indicated, brought about by proceedings instituted by a tenant for life. This being so, I think the reason the Master of the Rolls gives for restricting the words

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"or otherwise for the payment of the incumbrances," to sales *in invitum*, cannot be supported. The question is not before us as to whether the proviso took effect, and I give no opinion on it. I have not heard it argued. We must assume that it did not take effect as a matter of fact, and we must construe the deed on that assumption as a fact. At the same time we must take the entire deed (including the proviso) into consideration for the purposes of construction.

The objects and motives of the deed appear first from the recital: "That the said Lucy Boyd in consideration of the affection which she bears to the said James Boyd, Charles Boyd, and Isabel Lucy Boyd" (they are the personal objects of her affection), "and in order to enable them [the trustees] to manage the said real estates for the benefit of the persons interested therein under the said will, and to prevent if possible a sale of the said real estates for payment of the incumbrances." This plainly means any sale for the payment of debts which would take the estate out of the family. Which is the stronger of the two motives, the affection for the persons or the keeping the estate in the family? This is demonstrated by the first trust during the lives of the three named objects. Is it for them and the survivors and survivor? No, it is to apply the income for the discharge of the incumbrances as the trustees shall direct, and in default of direction to pay it to the person for the time being entitled to the real estate. At no time could more than one of them get a penny of the income, and, as the event proved, on the death of James, neither Charles nor Isabel Lucy could get a penny. Surely the contingency of James's death leaving issue was contemplated, and in that event she expressly provided that the other objects of her affection should get nothing, but that the income should go in aid of the estate and towards preventing the sale.

But if a sale of the class mentioned in the proviso took place, was the income to go to the person who would have been entitled to the estate? No. The income and corpus were at once to revert to herself if alive, and if she were dead to the named objects of her affection, James, Charles, and Isabel Lucy, as tenants in common. This seems to me to demonstrate that it was only for the purpose of preserving the estate that Lucy Boyd gave the

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income and corpus of the fund to the persons entitled under the will, and that when this became impossible, she gave income and corpus to the three specified objects of her affection, and struck out all benefit "to the parties entitled under the will."

During the lives of James, Charles, and Isabel Lucy, the first trust of the income is not for the benefit of any person; it is to the trustees to apply it in discharge of the incumbrances, and so prevent a sale. In default of their doing this the next trust is not for the persons for whom she had "the affection," but for the person, whoever he or she might be, whose duty it would be to keep down the interest on the incumbrances, and so prevent a sale.

These trusts of the income are confined to lives in being, so as to avoid the rule against perpetuities. On the determination of this trust she had to dispose of the corpus. The only persons who could take the inheritance were the unborn descendants of James, Charles, or Isabel Lucy. It is absurd to suggest that, apart from her desire to keep the estate in the family, the settlor had a greater "affection" for these descendants than for James, Charles, and Isabel Lucy. It was from this desire that she gave the corpus of the fund to the persons entitled to the inheritance. It was the most she could do to keep the estate in the family. But when this object ceased to be practicable, she gave income and corpus to the three named objects of her affection.

It may be said, however, that the proviso is confined to sales *in invitum*. Even assuming this to be so, is it not an absurd intention to impute to the settlor that while she took away all benefit from "the persons entitled under the will," if the property was sold in spite of these efforts to prevent it, she intended that they should have all the benefits if they or some or one of them brought this about by their or his own voluntary action. Just imagine this being suggested to the settlor when the instrument was being prepared. Yet it is solely in order to carry out this supposed intention of the settlor that we are asked to alter the language of the deed, and put into it gifts which it does not contain as it stands.

The questions in the case really are, assuming that the proviso did not take effect—(1) Is there any trust declared by the deed for persons *not in fact entitled to any estate* in the lands comprised in

the will, but who *would have been entitled thereto,* (*a*) if the lands had not been sold, and (*b*) if all the original limitations had taken effect? (2) If not, should we alter the language so as to make it include such gifts?

There are three statements in the deed to be dealt with— (1) As to the income. Here it is "to pay to the person or persons for the time being *entitled* to the real estate of the testator." (No reference to the will at all.) (2) As to the corpus. For the benefit of the person or persons who *shall then* be entitled to the inheritance of the real estate of the said testator *under the trusts of his said will, and so* that the same so far as it is charged on his *real estates shall sink into and merge in the inheritance of his real estate.* (3) The two are together referred to in the proviso as "the trust hereinbefore declared in favour of the person or persons for the time being entitled to the real estate." (Again no reference to the will.)

It is plain that there is no such trust as I have referred to declared on the words of the deed as they stand in their ordinary meaning. To turn the actual words into a trust in the events which have happened, we must substitute in (1) for the words "persons for the time being entitled," the words "persons who would for the time being have been entitled under the trusts of the will," and substitute in (2) for the words "persons who shall then" the words "who would have been then," and we must strike out the words "and so that the same shall sink into and merge in the inheritance of his said real estate." It would require strong evidence of intention arising from the entire deed to induce the Court to make such alterations as this in the language of the instrument. So far from there being any such evidence in this case, I am of opinion that such alterations would defeat the main object and intention of the deed as appearing on the face of it.

In my opinion the language of the deed in its natural and literal sense carries out the intention of the settlor. The actual title in fact to the actual estate was the essential part of the description of the intended donee in each case. I, therefore, think that, on the assumption that the proviso did not operate, there was on the passing of the property in the lands to the purchaser a resulting trust to the settlor of the corpus and income as from that date, and that the appeal should be dismissed.

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MOLONY L.J.:—

By his will dated the 15th March, 1858, James Boyd devised his dwelling-house at Rosslare and demesne to his sister, Lucy Boyd, for her life. He gave and devised all his real estates, including his said house and demesne, but subject as to the said house and demesne to the estate for life of his said sister therein, unto the Earl of Donoughmore and Philip Newton, to the use of the said Earl of Donoughmore and Philip Newton for the term of 200 years, and, subject to the said term, to the use of his grandson, James Boyd, and his assigns, during his life, with remainder to the use of his first and other sons and the heirs of his and their bodies successively and according to seniority in tail, with remainder to the use of his daughters and the heirs of their bodies as tenants in common in tail.

James Boyd died on the 1st April, 1859, and probate of his will was, on the 17th September, 1859, granted to the said Earl of Donoughmore and Philip Newton. The estate of James Boyd was, at his death, heavily incumbered, and in addition he owed to his said sister, Lucy Boyd, a sum of £4000.

The Earl of Donoughmore and Philip Newton were at first unwilling to prove the will, but Lucy Boyd was anxious that the will should be proved by the executors, and desired also to prevent, if possible, a sale of the real estates for payment of the incumbrances affecting the same. This being so, an arrangement was come to between the various parties interested in the estate, which resulted in the execution of the indenture of the 17th September, 1859, between Lucy Boyd of the first part, James Boyd, the eldest grandson and devisee named in the will of the said James Boyd, senior, of the second part, Isabel Lucy Boyd and Charles Boyd of the third part, Walter Hore and Michael Vickery of the fourth part, and the Earl of Donoughmore and Philip Jocelyn Newton, the trustees named in the will of the said James Boyd, senior, of the fifth part. By this indenture the said Lucy Boyd assigned the sum of £4000 due to her, and which was charged upon the real and personal estates of the testator under the trusts of his will, to the said Walter Hore and James Vickery, upon

trust as to £1000 for herself absolutely, and as to £3000, residue of said sum, and the interest thereafter to accrue due thereon, upon trust to pay the interest on the said sum of £3000 to the said Lucy Boyd for her life.

Lucy Boyd died on the 14th of March, 1867, and thereupon under the subsequent provisions of the deed the trustees were, during the lifetime of the said James Boyd, Charles Boyd, and Isabel Lucy Boyd, and the survivors and survivor of them, to apply the interest on the said sum of £3000 in payment and discharge of all or any of the charges or incumbrances affecting the real estates of the said testator, or of the interest thereof, in such manner as the said Earl of Donoughmore and Philip J. Newton, or the survivor of them, should by any writing under their hands direct, and, in default of any such direction, upon trust to pay the same "to the person or persons for the time being entitled to the real estate of the said testator if of the age of 21 years, or if under that age, to his or her guardian or guardians for his or her maintenance or advancement."

The object of Lucy Boyd was gradually to clear off the incumbrances on the estate, and to benefit the persons for the time being entitled to the real estate. She did this in the first instance by giving the trustees power to apply the interest of the £3000 in discharge of the incumbrances, and, in the absence of a direction from the trustees, the interest was to go directly to the persons entitled to the estate. This trust was limited in duration to the three lives then in being, so as to avoid any breach of the rule against perpetuities, but she provided that after the death of the survivor of the three persons, the trustees should stand possessed of the £3000 and of the interest thereof, and of the securities therefor, in trust for the benefit of the person or persons "who shall then be entitled to the inheritance of the said real estates of the said testator under the trusts of the said will, and so that the same so far as the same is charged upon the said real estates, shall sink into and merge in the inheritance thereof."

There is then a proviso that the trusts shall determine in the event of the said real estates being sold under a decree of the Court of Chancery, or by order of any other Court of competent jurisdiction, or otherwise, for the payment of the incumbrances

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or charges affecting the same, or any of them, during the lifetime of the said James Boyd, Charles Boyd, and Isabel Lucy Boyd.

James Boyd, the tenant for life under the will, had one son, James Jocelyn Boyd, and three daughters, namely, Mary Isabel Caroline Calm, Eileen Lucy Peretti, and Aimee Ashmore De Lange. He died on the 23rd July, 1891, and James Jocelyn Boyd thereupon succeeded to the estates as tenant in tail, and on the 27th August, 1904, he barred the entail.

James Jocelyn Boyd died on the 22nd March, 1907, intestate, and the said Mary Isabel Caroline Calm, Eileen Lucy Peretti, and Aimee Ashmore De Lange are his co-heiresses-at-law; and had the said James Jocelyn Boyd not executed the said disentailing deed, they would have succeeded to the estates as tenants in common in tail under the limitations in the will of James Boyd, senior, deceased.

James Jocelyn Boyd sold the lands to the occupying tenants thereof under the provisions of the Land Purchase (Ireland) Acts, and the sum of £3000 has been retained to meet the charge.

The question came before the Master of the Rolls on an originating summons brought by the present trustees of the settlement to determine who, in the events which have happened, was entitled to the capital and income of the said sum of £3000.

The Master of the Rolls held that the sale through the Land Commission was not a sale for the payment of incumbrances within the meaning of the provision in the settlement, and no appeal has been taken upon this point. It has, however, been contended on behalf of Mary Isabel Caroline Calm, Eileen Lucy Peretti, and Aimee Ashmore De Lange that they are now entitled to the £3000 as *personae designatae*, because if the disentailing deed had not been executed and the lands had not been sold, they would now be the persons entitled to the inheritance of the said real estates as tenants in common in tail. In this connexion the case of *Hogg* v. *Jones* (1) has been relied upon by Mr. Brown and Mr. Walker. That was a case in reference to plate, and in it Romilly M.R. held that, notwithstanding that there had been a

(1) 32 Beav. 45.

disentailing deed, the person who would have been tenant in tail under the settlement, had no such deed been executed, was entitled, because he was "the person who, under the limitations contained in the will (regarding them and them alone, undisturbed by any foreign cause), is entitled to such possession and enjoyment, and which he would have obtained unless these limitations had been defeated by a foreign circumstance over which neither the testator nor the legatee had any control." Lord Romilly rested his decision entirely upon the expressed intention of the testator. He said (at page 56): "The meaning expressed by the will is obvious; the testator in the events which have occurred, has expressed his intention in plain words, that E. M. Lyte should take the estate and the plate. A disentailing deed, which the testator could not prevent, has enabled two persons, now deceased, to defeat this intention as far as regards the estate; the intention of the testator as regards the plate could not be defeated by them, no deed would affect it; then why is that intention not to take effect?"

In the present case I have no doubt that what Lucy Boyd intended was that the estate should be kept in the family, and that the interest on the charge should be a fund for the payment of incumbrances so long as the estate was unsold. If, however, the lands were sold for the payment of incumbrances or charges, she made a special disposition of the charge. She also fully provided for what was to happen to the charge so long as the lands were unsold. Unfortunately she failed to provide for the thing which has happened, and which she could not have been expected to foresee, namely, the selling of the estate by the owner by means of a voluntary sale under the Land Purchase Acts.

As a result of that sale, the income of the charge cannot be applied to payment of incumbrances, because there are none; it cannot be given to the owner of the estate, because there is no person to whom the expression can now with propriety be applied; and the capital sum can never merge in the inheritance, because the inheritance has gone. It necessarily follows that in the events which have happened, the £3000 is now undisposed of, and that there is a resulting trust to the settlor.

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I think, therefore, that the Master of the Rolls was right in his view, and that the appeal should be dismissed.

Solicitors for W. J. Devereux and J. Kelly: *M. J. O'Connor & Co.*

Solicitor for Mary I. C. Calm, Eileen L. Piretti, and Aimee A. De Lange: *L. J. O'Reilly.*

Solicitors for Michael J. O'Connor: *M. J. O'Connor & Co.*

Solicitor for Isabel Lucy Boyd: *J. Hawthorne.*

Solicitors for Maud Tanner: *Little & Elgee.*

R. ST. J. C.

IN THE MATTER OF THE ESTATE OF THE EARL OF ERNE.

Wylie J.
1914.
May 12, 13.
June 4.

Appeal.
1914.
Nov. 5, 6.
Dec. 21.

Land Purchase Acts—Purchase by Congested Districts Board—Interest on Purchase Money up to Distribution—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 24, *sub-ss.* 2, 3—*Irish Land Act*, 1909 (9 *Edw.* 7, *c.* 42), *ss.* 26, 60.

The Congested Districts Board had, pursuant to s. 60, sub-s. 1, of the Irish Land Act, 1909, sent a final offer in writing to the owner of an estate for the purchase of it, and this offer had been accepted. On the 29th January, 1914, the Land Commission made an order vesting the estate in the Congested Districts Board, and an order for the payment of the purchase-money into the Bank of Ireland, and attaching claims to it. The purchase-money was placed on deposit receipt in the Bank. The vendor now claimed from the Congested Districts Board interest at the rate of 3½ per cent. from the date of the vesting order and payment into the Bank, until the distribution of the purchase-money.

Held, by the Court of Appeal, reversing the decision of Wylie J., that s. 26 of the Irish Land Act, 1909, applies to a sale to the Congested Districts Board, and that therefore the Board were not bound, in the absence of agreement, to pay such interest.

QUESTION arising, on the distribution of the purchase-money, as to the application of sub-ss. 2 and 3 of sect. 24 of the Irish Land Act, 1903, and sect. 26 of the Irish Land Act, 1909, to a purchase by the Congested Districts Board, under sect. 60 of the Act of 1909, by the acceptance by the vendor of a final offer sent to him by the Congested Districts Board, pursuant to sub-s. 1 of the last-mentioned section.

On the 28th October, 1912, the Congested Districts Board sent to the vendor a final offer, pursuant to the provisions of sect. 60, sub-sect. 1, of the Act of 1909, for the purchase of certain lands, portion of his estates situated in the County of Mayo. On the 24th January, 1913, the vendor accepted the said final offer. On the 20th January, 1914, the Congested Districts Board issued a request to the Land Commission to advance the purchase-money. On the 29th January, 1914, an order was made vesting the lands in the Congested Districts Board, and, on the same date, an order

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was made for the payment of the purchase-money into the Bank of Ireland, and attaching claims to the purchase-money. At the request of the solicitor for the vendor, the purchase-money was placed on deposit receipt. The vendor now claimed to be entitled to be paid interest at the rate of 3½ per cent. per annum by the Congested Districts Board from the date of the vesting order up to the time of distribution.

R. H. Macrory, for the vendor.

Ronan K.C. and *Leonard*, for the Congested Districts Board.

June 4. WYLIE J.:—

A very nice question has been raised in this case as to the application of sub-sections 2 and 3 of section 24 of the Act of 1903 to a purchase by the Congested Districts Board, under section 60 of the Act of 1909, by the acceptance by the vendor of a final offer sent to him by the Congested Districts Board pursuant to sub-section 1 of that section.

Now, in order to understand the point raised, we must see how the law stood prior to the Act of 1909. No one, I think, can read the first twenty-five sections of the Act of 1903 without coming to the clear conclusion that they, by themselves, extend to two classes of sales only—viz. (*a*) the sale of an estate by an owner to persons as occupiers of holdings or parcels, and (*b*) the sale of an estate to the Land Commission; the "estate" in both cases being one "declared" by the Land Commission. This being so, section 24, sub-section 1, provides that "in the case of the sale of an estate to persons other than the Land Commission, so soon as the holding or parcel of land comprised in the estate is vested in the purchaser, the Land Commission shall, in pursuance of sub-section 1, section 14, of the Act of 1887, pay the purchase-money into the Bank of Ireland." It is clear, I think, that the words, "persons other than the Land Commission," in this sub-section mean what is commonly known as tenant purchasers, as in said section 14, and do not include the Congested Districts Board, who are, by their own Act of 1893, to be deemed *landlords* of all lands acquired by them.

We come now to the two sub-sections on which the question

arises. Section 24, sub-section 2, enacts that "where land is vested in the Land Commission by a vesting order made by them, or where money is paid into the Bank of Ireland as aforesaid, the Commission shall, subject to the provisions of this Act, pay interest on so much of the purchase-money as is for the time being undistributed, at the rate of 3½ per cent. per annum, from the date of the order, or the payment into the bank, as the case may be, until the whole of the purchase-money is distributed"; then sub-section 3 adds a proviso: "If in the case of an estate sold to persons other than the Land Commission the dividends upon the investments representing the purchase-money are insufficient for the payment of the said interest, the deficit shall be paid out of the purchase-money." Now, it appears to me, there cannot be a shadow of doubt as to the meaning and effect of those two sub-sections. In both the classes of sales I have referred to, the Land Commission are to pay 3½ per cent. interest on the purchase-money from the dates specified until the whole of the purchase-money is distributed; but, when the sale is to "persons other than the Land Commission," where the money is required to be paid into bank, and can be invested on the application of the persons interested, if the dividends are not sufficient to pay the 3½ per cent., the Land Commission are not to pay it out of their own funds, but the deficiency is paid out of the purchase-money. The reason for this distinction is obvious when we look at the previous provisions of the Land Purchase Acts. In the case of a sale to persons other than the Land Commission, the purchasing tenants pay to the vendor, through the Land Commission, interest in lieu of rent up to the date of the advance, under section 35 of the Act of 1896; and when the money is advanced and paid into the bank, the vendor is entitled to the dividends on the investments, so that at no stage in the course of the carrying out of a sale to "persons other than the Land Commission" has the Land Commission any funds derived from the estate out of which they can pay the 3½ per cent. Whereas, in the case of a sale to the Land Commission, the Land Commission are, by section 18, entitled from the date of the agreement to the rents and profits, and the interest in lieu of rent, as well as arrears of rent due at the date of the agreement, and the Land Commission are, by the same

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section, bound to pay the vendor 3½ per cent. interest from the date of the agreement to the date of the vesting order, and afterwards, by sub-section 2 of section 24, from the date of the vesting order until distribution, so that in this way they are supplied with funds out of which they can pay the 3½ per cent interest.

The difference in the mode of financing the two classes of sales will be further seen by a reference to sections 36 and 45 of the Act of 1903. By section 36 the Land Commission are bound to pay the National Debt Commissioners interest at 2¾ per cent. on all sums advanced, from the date of the advance. In direct sale cases, that interest is paid by means of the tenant purchaser's annuity, which the Land Commission simply collect and pay over. In the case of sales to the Land Commission, if the Land Commission called for the advance at the date of the vesting order, there being no purchase annuities until a re-sale, they would be bound to pay 2¾ per cent. interest to the National Debt Commissioners, as well as the 3½ per cent. to the vendor until distribution. Consequently, in these cases, the Land Commission never called for the advance until distribution, and paid the 3½ per cent. out of the interest in lieu of rent or the rents and profits.

Now let us see how purchases by the Congested Districts Board are dealt with in the Act of 1903. Part II of the Act applies to them. Section 72 provides that "the sums required by the Congested Districts Board for advances for the purchase of land shall be paid to them out of the advances made by the National Debt Commissioners to the Land Commission under this Act, and all payments so made shall be deemed to be advances made to the Land Commission for the purposes of the Land Purchase Acts." Consequently, by sect. 36, the Land Commission are bound to pay to the National Debt Commissioners 2¾ per cent. from the date of advance until its repayment, and, in order to provide a fund for payment of interest, the Congested Districts Board are, by sub-s. 2, bound to pay the same amount of interest to the Land Commission. Therefore if, in the case of a sale to the Congested Districts Board, the Board called upon the Land Commission for payment of the advance at the date of the vesting order, the Congested Districts Board would have to pay to the Land Commission 2¾ per cent. interest from that date, but, as against

this, as the advance is, under the Act, to be paid to them, they would have the benefit of the dividends on its investment. To avoid this liability for payment to the Land Commission of 2¾ per cent. interest, it has been almost the invariable practice of the Board not to call for the advance until distribution; and no money was lodged in bank until then.

Now we come to the question as to whether the Congested Districts Board are bound to pay 3½ per cent. interest to the vendor, under sect. 24, sub-s. 2, from the date of the vesting order until distribution. As I have already said, it is clear, I think, from the section itself, that it does not in terms apply to the Congested Districts Board, and this view is confirmed by sect. 79, sub-s. 2. By sub-s. 1 of that section, when the Congested Districts Board have arranged to purchase an estate, the Land Commission are to prepare the agreement for purchase, and to make the vesting order. And then sub-s. 2 provides that, where such vesting order is made "the purchase-money shall be distributed by the Land Commission in like manner as if it were the purchase-money of land vested in the Commission, and all the provisions of Part I of this Act with respect to the distribution of the purchase-money of land so vested shall apply accordingly." The effect of that would seem to me clearly to be, that all the provisions of sect. 24 (except sub-ss. 1 and 3), as well as sect. 25, of the Act would apply to the Congested Districts Board. Sub-s. 2 of sect. 24, which provides for the payment of 3½ per cent. until the money is distributed, is, I think, a provision with respect to distribution, just as the provisions of sect. 25 are; and both are made applicable by sect. 79, sub-s. 2, to the case of a sale to the Congested Districts Board. In any event, in the case of *In re Blake's Estate* (1), Meredith J. clearly decided that sub-s. 2 so applied, and that the Congested Districts Board were bound by it to pay interest at 3½ per cent. from the date of the vesting order until distribution. This was obviously in accordance with the ordinary rights of the parties as vendor and purchaser, because the Congested Districts Board, by sect. 56 of the Act of 1909, get the rents and profits from the date of the agreement for purchase, and are bound, as the Land Commission are bound by sect. 18, sub-s. 2, of the Act

(1) 39 I. L. T. R. 45.

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of 1903, to pay interest at 3½ per cent. from that date until the land is vested, and the vendor should get further interest until he gets his money. Therefore, I assume, as decided in *In re Blake's Estate* (1), that, up to the passing of the Act of 1909, the Congested Districts Board were liable to pay this 3½ per cent. interest, and that sub-s. 3 of sect. 24 did not apply in case of a sale to the Congested Districts Board, just as it did not apply in case of a sale to the Land Commission.

Now let us see what change has been made in respect of this matter by the Act of 1909. Sect. 26 of that Act provides that "where an estate is vested in the Land Commission by a vesting order made by them, the purchase-money may be paid into the Bank of Ireland, and invested in like manner as if the estate had been sold to persons other than the Land Commission, and the provisions of sub-s. 3 of sect. 24 of the Act of 1903 shall apply in the case of every sale to the Land Commission where the purchase-money has been invested under this section." That section in clear and express terms extends and applies sub-s. 3 of sect. 24 to the case of a sale to the Land Commission; and, when the estate is vested, the Land Commission may, if they think fit, pay the purchase-money into Bank and invest same; and, if the dividends are not sufficient to pay 3½ per cent. interest, the deficiency is paid out of the purchase-money. But the section is so clearly and expressly limited to the case of a sale to the Land Commission, that by no stretch of construction could it be held to extend to a sale to the Congested Districts Board. Indeed, having regard to the law as it existed at the time of the passing of the Act of 1909, one would think, on reading the section, that the draftsman, having the point clearly before his mind, had carefully selected words that could not by any possible interpretation be extended to a sale to the Congested Districts Board. If it had been intended so to extend the section, nothing could have been simpler than to add, after the words "in the Land Commission" in sect. 26, the words "or in the Congested Districts Board," as is done in sects. 23 and 24. But counsel for the Congested Districts Board contend that sect. 26 must be read in connexion with sect. 24, sub-ss. 2 and 3, and sect. 79, sub-s. 2, of the Act of 1903,

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and that, by reading it in as an amendment to sect. 24, then sub-s. 2 of sect. 79, which applied the original provisions of sect. 24 to the case of a sale to the Congested Districts Board, should be read as applying the amended provisions also. In other words, because the Legislature has in effect amended sect. 24 by extending sub-s. 3 to the case of a sale to the Land Commission, I am to assume that they intended also to amend sect. 79, sub-s. 2, by making it extend and apply to a sale to the Congested Districts Board—a new enactment, which is inconsistent with the former Act, and is by its terms expressly limited to the case of a sale to the Land Commission. If this had been the intention, it would have been, as I have said, easy to say so; and I think this contention of the Congested Districts Board fails.

Now, so far I have dealt with the law as applicable to an ordinary sale by voluntary agreement. But the sale in this case was under sect. 60 of the Act of 1909. It was, in the ordinary sense, neither voluntary nor compulsory, but seems to lie half way between. It is a sort of voluntary sale under a threat of compulsion, but it has its advantages, which both vendors and the Congested Districts Board have not been slow to find out. The section provides that, where the owner and the Congested Districts Board have not come to an agreement, the Board may, if they think fit, send a final offer in writing for the purchase of the estate. If the final offer is accepted, then the offer and acceptance have the effect of an agreement; but the advance is to be in cash and not in stock, and this is the only difference between this agreement and an ordinary voluntary agreement. The difference is so highly valued, however, by both the contracting parties, that the ordinary course of a sale to the Congested Districts Board under the Act of 1909 is for the parties to arrange the price, and then, in order to get cash instead of stock, the vendor asks to have a final offer sent, which by previous arrangement he accepts. So far both parties are agreed as to the effect and advantage of having an agreement arrived at in this way. But the Congested Districts Board further contend that the effect of this agreement under sect. 60 is to bring the case under the provisions of sect. 26, which extended sub-s. 3 of sect. 24 of the Act of 1903 to a sale to the Land Commission. Their argument is based on the provisions of

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sect. 60, sub-s. 2, which provides that "the provisions of Part II of this Act with respect to the particulars to be inserted in a final offer sent by the Estates Commissioners shall apply in the case of a final offer sent by the Congested Districts Board under this section, with the substitution of the Congested Districts Board for the Estates Commissioners, and the provisions of Part II of this Act with respect to the acceptance of a final offer sent by the Estates Commissioners shall apply in the case of the acceptance of a final offer sent by the Congested Districts Board, with the substitution of sect. 79 of the Act of 1903 for sect. 17 of that Act." Now, the provisions of Part II thus applied to an agreement for purchase by the Congested Districts Board are contained in sect. 43, sub-ss. 2 and 3. The effect of those provisions, in case of a sale to the Land Commission, no doubt, is that, when an offer is sent under sect. 43 by the Estates Commissioners, and is accepted, the offer and acceptance are to have the same effect as an agreement for purchase by the Estates Commissioners under the Act of 1903, as amended by the Act of 1909, with the like consequences as in the case of such an agreement, save as to the advance being in cash and not in stock, and one of the consequences would undoubtedly be that, if the Estates Commissioners lodged the money in bank and invested it, sect. 24, sub-s. 3, would, by virtue of the amendment contained in sect. 26 of the Act of 1909, apply to the case. Counsel for the Congested Districts Board, therefore, contend that this particular consequence must also apply to the case of an agreement for purchase by the Congested Districts Board by virtue of sect. 60, sub-s. 2. But if you substitute the Congested Districts Board for the Estates Commissioners in sect. 43, sub-s. 1, the agreement constituted by the offer sent by the Congested Districts Board and its acceptance has, under the section, only the effect and consequences of an ordinary voluntary agreement for purchase by the Congested Districts Board under the Act of 1903 as amended by the Act of 1909, and as the amending provisions contained in sect. 26 of the Act of 1909 do not apply to the case of land vested in the Congested Districts Board, but only to the case of land vested in the Land Commission, the consequences flowing from that amendment cannot apply to the case of a purchase by the Congested Districts Board.

But this does not entirely dispose of the question in the present case, because, although sect. 26 does not apply, and there is nothing either in sect. 43 or sect. 60 requiring or permitting the money to be paid into bank, the money has in fact been paid in and has been invested on deposit receipt, bearing only a small rate of interest. Therefore somebody must lose something, because, since the date of the advance, the Congested Districts Board are liable to pay 2¾ per cent. interest to the Land Commission, and the deposit interest does not produce that. If it had not been paid in, the Congested Districts Board would have been liable to pay interest at 3½ per cent. to the vendor until distribution, but would have been under no liability for interest to the Land Commission. As I have decided, the Congested Districts Board have no right to have it paid in under sect. 26 so as to affect their liability to pay the full 3½ per cent., and, if the vendor has done nothing in connexion with the payment in and investment of the money to prejudice his rights, he cannot be affected by the payment in. Now, on looking into the documents, I find that the money was advanced and paid into bank at the express request of the Congested Districts Board. They are, therefore, responsible for the payment in, and if it had been well invested probably no one would have suffered. But it was placed on deposit receipt at the express request of the solicitor for the vendor, who, as I understand, refused to have it invested otherwise. It is plain that the persons interested in having an investment producing at least 2¾ per cent. were the Congested Districts Board. But they did not apply to have it otherwise invested, as they might have done, though they would probably have been required to give an undertaking to make up any deficiency on realization of the investments, if they had depreciated in value before distribution. This point arose in many cases where the Land Commission bought land under the Evicted Tenants Act, and were by it bound to pay the money into bank, so that from the time of payment in until the time of distribution they were bound to pay to the vendor 3½ per cent. interest, and also 2¾ per cent. to the National Debt Commissioners, and the Land Commission, in order to make as much out of the money as they could, had it well invested, and where there was a deficiency on realization, they paid up the

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difference. It seems to me that the Congested Districts Board have placed themselves in a similar position in this case by calling upon the Land Commission to pay the money into bank at the date of vesting. They are responsible for the payment in, and I cannot see how the vendor can be held to have prejudiced his right to the 3½ per cent. interest by asking that the money should be placed on deposit receipt, so as to avoid any deficiency on distribution.

I, therefore, hold that sect. 24, sub-s. 3, does not apply to this case, and that the 3½ per cent. interest is to be paid by the Congested Districts Board, who will, of course, be entitled to the interest on the deposit receipt.

J. E. W.

The Congested Districts Board appealed (1).

Ronan K.C. and *Leonard*, for the appellants.

S. L. Brown K.C. and *Macrory*, for the respondent.

Dec. 21.

O'BRIEN L.C. :—

The question which we have now to determine is one of very considerable importance. It is whether or not sect. 26 of the Irish Land Act, 1909, applies to a sale to the Congested Districts Board.

Under the provisions of the Land Purchase code, whether the purchasers are the tenants, the Land Commission, or the Congested Districts Board, interest at the rate of 3½ per cent. is to be paid to the vendor from the vesting order or payment of the purchase-money into the Bank of Ireland, until the distribution of the purchase-money. In the case of direct sales to tenants, where the dividends on investments representing the purchase-money brought to credit are insufficient for the payment of this interest, the difference had to be made up by a deduction from the purchase-money. In the case of sales to the Land Commission prior

(1) In the Court of Appeal, before O'BRIEN L.C., and HOLMES and MORIARTY L.JJ.

to the Act of 1909, however, it was otherwise; they had to pay the deficit of interest, and provide the money for that purpose from public sources, or avoid loss by such an arrangement as Mr. Justice Wylie has so fully explained in his judgment, of not calling for the advance until distribution. The Act of 1909 introduced considerable alterations into the Land Purchase code, one of the most important being that both the Estates Commissioners, whose functions were confined to non-congested districts, on the one hand, and the Congested Districts Board on the other hand, were given powers enabling them compulsorily to acquire estates. Speaking in general terms, the procedure followed for so acquiring estates is begun by a proposal made to the owner by the Estates Commissioners, or the Congested Districts Board, as the case may be, for the purchase of the lands at a price named in such proposal. If that offer is accepted, there is a concluded and binding contract, and, what is now of great practical importance (owing to the altered state of the money market), in place of the payment of the purchase-price being in stock, cash has to be procured. If the proposal is not accepted, then the actual compulsory machinery is put into force, always, however, by the Estates Commissioners—a matter that cannot be lost sight of in considering the ultimate effect and trend of the sections of the Act of 1903 and of the Act of 1909.

Now, prior to the Acts of 1903 and 1909, the position of the Congested Districts Board was both in form and substance far different from what it became by operation of these two statutes, and especially by operation of the Act of 1909. They were a board operating through trustees, and under the Land Law (Ireland) Act, 1896, were placed in a very peculiar position. While they were in no sense tenants, and were a public body dealing with public money for the purchase of estates for certain public purposes, still sect. 43 of that Act placed them in the category of tenant-purchasers. "Where the Congested Districts Board have agreed to purchase land, whether in a congested districts county or elsewhere, the Land Commission, on a request from the Board stating the congested districts county for the benefit of which the land is purchased, and the amount of the purchase-money, shall, subject as in this section mentioned, advance the

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purchase-money to the Board in like manner as if the Board were a tenant purchasing his holding under the Land Purchase Acts." That status of the Congested Districts Board has been fundamentally altered by the Acts of 1903 and 1909; sect. 43 of the Act of 1896 has been repealed, and accordingly when we come to deal with the Acts of 1903 and 1909, we cannot construe them on the assumption that the Congested Districts Board are in the position of tenant-purchasers; we must ascertain their true legal status from the statutes of 1903 and 1909 themselves. The Irish land code has been the highest development of a system of legislation by cross-reference. We have sections transferred from the Land Purchase code to the Congested Districts code, and vice versa. We have parts of statutes which are to be read with the Land Purchase code, others with the Land Act code, and others with the Congested Districts code, and so complex has the matter become that the draftsmen themselves in some instances have omitted to tag together successfully the different sections and the different portions of the Acts of Parliament, and in some cases it is necessary to imply that particular portions of these Acts were intended to be read together in order to give a reasonable construction to them, though no such provision is expressly made in the definition sections. Any question arising on the construction of sections that have to be dealt with in this way is necessarily difficult, and whereas in a clear-cut, net code, not legislating referentially, you may rationally draw a conclusion from the presence or absence of particular words, and say that if the Legislature had or had not intended a certain thing they would have inserted words or omitted words making that intention plain, it seems to me that such a rule cannot be strictly applied to a code like the present. As I have pointed out, the draftsmen got lost in a maze of their own creation, and we can only try and do our best to solve the difficulties.

The first matter to which I direct attention is the position of the Congested Districts Board under the Act of 1903. It had not yet developed to the commanding position that it occupies under the statute of 1909, but we cannot solve the present question unless, as far as we can, we clearly appreciate the position of the Congested Districts Board under the earlier statute. Now, the

first part of the Act of 1903 deals with land purchase, and although there are references here and there in it which might, if they stood alone, apply to the Congested Districts Board, yet the scheme of legislation was, first, to create as far as possible a land-purchase scheme; and, secondly, sect. 43 of the Act of 1896 being repealed, to bring over or attract by cross-reference into Part II, which deals with congested districts, such portions only as the draftsman thought were necessary for the purpose of effectuating the result which the Legislature desired to bring about, namely, the purchase of estates for the relief of congestion by this statutory board, which was for some purposes to be kept as independent as possible, but for other purposes was to be dependent upon the Estates Commissioners. Accordingly, when we come to deal with the group of sections in the Act of 1903 which are especially to be considered in connexion with the present case, and particularly sects. 24 and 25, we do not find therein any distinct reference to the Congested Districts Board. I think Mr. Justice Wylie is quite correct in saying that the whole of these sections, beginning with sect. 1 and going down to sect. 25, deal only with cases of sales by an owner to the tenant or to the Land Commission. The repeal of sect. 43 of the Act of 1896 makes it so far impossible to include the Board under the description "persons other than the Land Commission" in the sense of tenant purchasers. Accordingly, what would at first have appeared a simple solution of the question becomes impossible. It is on sect. 79, so far as the Act of 1903 is concerned, that the whole working of purchase by, and sales to, the Congested Districts Board depended. The first part of sect. 79 deals with the granting of a certificate that a person may be dealt with as an owner. This certificate is to be issued by the Estates Commissioners to the Congested Districts Board, and they can then enter into agreements with the person so certified for the purchase of his lands. There was no power given to the Congested Districts Board themselves to be satisfied—the machinery of the Act is thus set in motion, the Estates Commissioners preparing the agreements and making the orders for vesting. Then comes sub-s. 2—"Where a vesting order is made in pursuance of this section the purchase-money shall be distributed by the Land Commission

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in like manner as if it were the purchase-money of land vested in the Commission, and all the provisions of Part I of this Act with respect to the distribution of the purchase-money of land so vested shall apply accordingly." But there was substituted for the proceedings which would have taken place in other cases, a proceeding by which the agreement was to be prepared, not by the Congested Districts Board, but by the Estates Commissioners. The position of affairs was this, that while the Congested Districts Board became the purchasers of the land, so far as procedure was concerned it was really the operation of the Estates Commissioners which enabled the thing to be done at all, and, subject to the rules to be made by the Lord Lieutenant, the Estates Commissioners were the body to regulate the agreement by which the purchase was made, and the ultimate distribution of the purchase-money was vested in the Land Commission. At this stage one must consider the difficulty that arose a very short time after the Act of 1903 was passed. The Congested Districts Board are not named in sect. 24. They are not "persons other than the Land Commission," and therefore they do not come under clause 3. But as they were purchasers, and as there was a vendor—a person made vendor for the purposes of the Act—it was absolutely essential, if the agreement was to be a fair one, that some provision should be contained in it by which interest would be paid at some rate, and obviously the interest ought to be at the rate of 3½ per cent., and the question arose for decision in *Blake's Estate* (1) as to what was the period at which it ought to terminate, and out of what fund it should be given. Now it is to be remembered, so far it was a matter of agreement altogether, and in my judgment a matter of agreement it always remained. The agreement had to be prepared, and some provision inserted in it dealing with the question of interest. Accordingly, in the preparation of the agreement the question arose, was the 3½ per cent., which was the just amount to be paid in the shape of interest, to be paid until the distribution of the purchase-money? Would it be fair to deduct it from the purchase-money, or was it to be paid by the Congested Districts Board to the vendor down to the

(1) 39 I. L. T. R. 45.

time of the distribution? Now I think that in fairness there was only one way of solving that question, and that it was rightly solved, in fact, as a matter of fairness, in *Blake's Estate* (1), by Mr. Justice Meredith. I conceive, however, that a construction has been put upon his judgment which I do not think it necessarily bears. The provisions that are to be incorporated for the purposes of section 79 are the provisions of Part I with respect to the distribution of the purchase-money; neither sub-section 2 nor 3 of section 24 deals with this subject. What, then, was the decision of Mr. Justice Meredith in *In re Blake's Estate* (1)? I think that the decision was equitably right, and that any other decision would have made the procedure unworkable. But to my mind it only decided that the whole rights of the parties flow from the contract, and that in framing the contract you have to consider the position of the Land Commission, and the position of ordinary purchasers, and ultimately determine what is the equitable order to make; and, once made, that order, as it should be followed in other cases, became immutable, because it became the fixed rule and practice of the Court, and is so at the present time. It is, however, quite unnecessary, and in my opinion would be wrong, to construe the learned judge's decision as a decision that sub-sect. 2 of sect. 24 was itself attracted into sect. 79. Let us look into the judgment. If sect. 24 legislated for the situation, there was no necessity for making provision for the payment of the interest in the agreement at all. But Mr. Justice Meredith is perfectly clear, as I construe his decision, that sub-sect. 2 does not legislate for it, for he puts in his judgment the case of a person who, though he is vendor, turns out subsequently not to be the owner. He says (p. 47):—"What I want to make clear is that although I hold that the Estates Commissioners must provide for the existence of money which they may be called upon by the parties entitled to the purchase-money to pay, yet it may be possible to frame an agreement under sect. 79 in such a way as to leave open the door to a binding agreement between a vendor absolutely entitled if it turns out that he is absolutely entitled, and the Congested Districts Board, that the vendor will not claim interest

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under sect. 24 of the Act." That passage is inconsistent with the assumption that sect. 24 was brought over into sect. 79, and made applicable to every case by force of the statute. But one can see easily what the learned judge really means. He lays stress on what I have been referring to—the initiative in this case comes really from the act of the Estates Commissioners. The agreement is one which they are to control, and the Land Commission, of whom they are Commissioners, are the body who are to deal with the purchase-money. Accordingly, he considers rightly, as I understand the judgment, that in framing the agreement it would be wrong, having regard to the fact that sect. 24 (3) cannot apply, not to frame an agreement for the payment of interest at the rate of 3½ per cent. What he says (p. 46) is this: "Now, the Lord Chief Baron, in his reference to sect. 24, was dealing with a case in which a landlord sells direct to a tenant. But the consequences which follow in a sale under sect. 17, so far at least as they relate to the questions I have to consider in the present case, are, if not identical, at all events similar in their character, whether the sale is made direct to the tenants or otherwise. Section 24, sub-s. 2, deals with the question of interest. Sub-section 3 is not applicable in the case of an estate sold to the Land Commission. . . . The provisions contained in sect. 25 are also of importance in this case. In my judgment the provisions of sect. 25 form part of the provisions of Part I of this Act with respect to the distribution of the purchase-money of land, within the meaning of sect. 79, just as the provisions of sect. 24 undoubtedly do. It follows that when the Estates Commissioners proceed to prepare an agreement between the Congested Districts Board and the vendor, under the circumstances which exist in this case, they must have regard to the provisions contained in sections 24 and 25 with regard to the distribution of the purchase-money, including the payment of interest on the purchase-money. According to my reading of the Act and the sections I have referred to, the intention of the Legislature was that both in Land Commission cases and in Congested Districts Board cases the 'closing day' should be fixed at such legitimate and proper time as would enable the title of all persons interested in the purchase-money to be really investigated by the Land Commission,

and that down to that date the Land Commission on the one hand, and the Congested Districts Board on the other, should be bound to pay interest at 3½ per cent. on the purchase-money, or on so much thereof as for the time being remains undistributed. I do not say that they should not be bound to pay interest at that rate after the 'closing day,' because the provisions of sect. 25 (2) with regard to the payment of interest at a rate different to that of 3½ per cent. apply only in cases where there has been neglect or default on the part of the person interested in making out his title, and sub-sect. 3 only applies where there has been inexcusable delay. Neither the Land Commission nor the Congested Districts Board can escape payment of interest at the rate of 3½ per cent. after the 'closing day,' unless there has been neglect or default or inexcusable delay. The question then arises, can the Congested Districts Board make an agreement with the vendor under sect. 17 which will ignore the provisions of the Act of Parliament?" That is, ignore the provisions of the Act of Parliament so far as they provide the only analogy that could be provided, namely, the case of a purchase by the Land Commission. What the judge had to do was to decide what ought to be in an agreement. It might be an elastic agreement in some views of it; and accordingly he answered the question raised in these words:—"My answer to question (1) will be that agreements prepared by the Estates Commissioners under sect. 79 must provide, in the first instance, for the payment of interest on the purchase-money by the Congested Districts Board until the whole of the purchase-money has been distributed under Part I of the Act." Accordingly, I am of opinion that, while we have a fixed practice which regulated all agreements in the case of purchase by the Congested Districts Board from 1903 to 1909, it did not flow from the automatic incorporation of sub-s. 2 of sect. 24 into sect. 79. Of course, if sub-s. 2 of sect. 24 of the Act of 1903 had been incorporated in sect. 79 of the Act, there would be great force in the argument put forward on behalf of Lord Erne, that because, at the passing of the Act of 1909, it had been decided that the Act of 1903 had, through the operation of sect. 79, expressly provided for the payment of

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interest at 3½ per cent. in the case of purchases by the Congested Districts Board, and sect. 26 of the Act of 1909 in terms only refers to the Land Commission, and sub-s. 2 of sect. 24 of the Act of 1903 is not in terms repealed, therefore, there having been a legal interpretation of the statute in force at the date of the passing of the Act of 1909, that sub-section has been affected by sect. 26 of the Act of 1909 only in relation to sales to the Land Commission, and remains unaffected in relation to sales to the Congested Districts Board, the contracts for which it had been decided should be regulated by its provisions; but I consider the provision for payment of interest in the contract for a sale to the Congested Districts Board was only a practice of the Court which must be as flexible after the passing of the Act of 1909 as before it, and that this argument fails. Under the Act of 1903 the Estates Commissioners really initiate the proceedings by issuing a certificate; they control the proceedings by the form of the contract; it is dealt with not by statute, but by agreement; they were the body regulating the whole situation.

How is that developed and dealt with in the Act of 1909? In some ways it is extremely interesting, for it assimilates the position of the Land Commission and the Congested Districts Board in such a manner that it would be contrary to common sense if sect. 26 of the Act of 1909, which affects sales to the Land Commission, was not to be considered in determining the form of the agreement for a sale to the Congested Districts Board. I think it is manifest that the agreement is not an agreement under the Act of 1903, but an agreement under the Act of 1903 as amended by the Act of 1909. An important alteration with regard to the purchase of congested estates is initiated in Part II of the Act of 1909, which deals with land purchase. Sect. 43 gives to the Estates Commissioners, where the congested estate, or untenanted land, is situated in a non-congested districts county, power to make an offer for the purchase of a congested estate or untenanted land at a price named, and it makes acceptance of it binding in this way:—"If within the time specified in that behalf in the final offer, the offer is accepted in writing by any person who within the prescribed period satisfies the Estates Commissioners that he may be

dealt with as the owner of the estate or untenanted land under sect. 17 of the Act of 1903, the offer and acceptance shall, as from the date upon which the Estates Commissioners certify that they are so satisfied, have the same effect as an agreement for the purchase of the estate or untenanted land under the said Act as amended by this Act, and the like consequences shall ensue, and the like proceedings shall be carried on, as in the case of such an agreement, save that the advance for the purpose of the purchase shall, notwithstanding anything to the contrary in this Act, be made by means of money and not by means of stock."

Then there is an exception to that last provision for the payment in money, and the section proceeds (sub-s. 4) :—"If the said offer is not accepted as aforesaid, the Estates Commissioners may, if they think fit, proceed to acquire the estate or untenanted land compulsorily in manner provided by Part IV of this Act." The corresponding section dealing with offer and acceptance in the case of the Congested Districts Board is sub-s. 3 of sect. 60 :—"If the final offer is not accepted in accordance with the foregoing provisions of this section, the Congested Districts Board may, if they think fit, send to the Estates Commissioners a requisition calling upon the Estates Commissioners to take steps to acquire the estate or untenanted land compulsorily in manner provided by Part IV of this Act." Now, it is to be observed that if the offer is refused, it is the Estates Commissioners who are to take steps to acquire the land. Once the offer and acceptance—a matter of procedure—are completed, the real substantial part of the work is brought back and placed in the hands of the Estates Commissioners. Sect. 61 provides, "The Estates Commissioners in any case where they propose to acquire compulsorily an estate or untenanted land —(*a*) in respect of which a final offer has been sent by them and has not been accepted in manner provided by this Act; or (*b*) in respect of which they have received a requisition under this Act from the Congested Districts Board, shall publish in the Dublin Gazette a notice containing particulars of the final offer of the Land Commission or the Congested Districts Board as the case may be, and stating that the Estates Commissioners intend to purchase the estate or untenanted land described in the final offer at the price named in such offer, unless within the prescribed

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time an application is made under this Part of this Act to the Judicial Commissioner by any person interested in the estate or untenanted land." Then there is a clause which provides that a copy of this final offer and notice shall be served on all persons known or believed to be interested in the estate or untenanted land. And sect. 64 provides:—"Subject to any application to the Judicial Commissioner under this Part of this Act, and the final determination of all questions arising thereon, the price named in the final offer, or fixed as the case may be under this Part of this Act, shall be deemed to be the purchase-money of the estate or untenanted land, and shall, within the prescribed time, be paid into the Bank of Ireland, and the purchase shall be completed, and the purchase-money distributed in like manner, and all the like consequences shall ensue, as if the estate or untenanted land had been purchased by the Land Commission or the Congested Districts Board, as the case may be, by agreement entered into under the Act of 1903 as amended by this Act."

It was argued here that there was in sect. 64 evidence of an intention on the part of the Legislature that, in respect of this one matter of the payment of interest at 3½ per cent., out of all the matters in the code, the Congested Districts Board and the Estates Commissioners should be dealt with differently. It seems to me that the rational view of the section is this. Where the Congested Districts Board are the purchasers, a certain amount of supplementary machinery is to be brought into action. The offer and acceptance are matters which come within the purview and operation of the Congested Districts Board. But as soon as that is ended, if the offer fails to bring about an acceptance, the Estates Commissioners are to be put into action, and they purchase the lands. The purchase-money is to be the price named in the final offer, subject to any alteration that may be made by the Judicial Commissioner upon objection by a person interested in the lands. Looked at in the light of the compulsory sections, it would be extraordinary in legislation of this kind that the one question of the 3½ per cent. should be dealt with on a different footing. To my mind an examination of the sections shows that the whole trend of the Act is to place purchases by the Estates Commissioners on the same footing in

every respect as purchases by the Congested Districts Board. Let us look at sect. 60 closely. The first sub-sect. gives the Congested Districts Board power to send a final offer in writing for the purchase of an estate in a congested districts county, and sub-sect. (2) goes on—"The provisions of Part II of this Act, with respect to the particulars to be inserted in a final offer by the Estates Commissioners, shall apply in the case of a final offer sent by the Congested Districts Board under this section, with the substitution of the Congested Districts Board for the Estates Commissioners"—there they are substituted *simpliciter*—"and the provisions of Part II of this Act with respect to the acceptance of a final offer sent by the Estates Commissioners shall apply in the case of the acceptance of a final offer sent by the Congested Districts Board, with the substitution of sect. 79 of the Act of 1903 for sect. 17 of that Act." The Legislature wished to preserve the machinery of Part II with regard to the Congested Districts Board, because confusion would have arisen if the Congested Districts Board had not been consistently placed precisely in the position of the Land Commission. To argue, as has been argued so strenuously, that the effect of the section is to keep the Congested Districts Board, for the purpose of making an agreement, in a sort of water-tight compartment, seems to me unsustainable. Section 43 would become unintelligible, even reading in sect. 79 of the Act of 1903. By section 43 (3) of the Act of 1909 the offer and acceptance are to have the same effect as an agreement under the Act of 1903 "as amended by this Act." Now, how is it amended by this Act? By sect. 26, amongst others. Section 26 sweeps away, so far as the Estates Commissioners are concerned, sub-sect. 2 of sect. 24 of the Act of 1903, and sub-sect. 3 for the first time becomes substituted for it. Accordingly, having regard to my view that it is a question of the construction of the agreement, it would be extraordinary, when looked at as part of the general trend and interpretation of the statute, if in framing the new agreement the altered condition of the law must not prevail. Mr. Justice Meredith, in *Blake's Estate* (1), says: "Section 24 (3) is not applicable in the case of an estate sold to the Land Commission." But, after the Act of 1909,

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sect. 24 (3) of the Act of 1903 has everything to say to a sale to the Land Commission. And it would seem to me that in framing an agreement under the Act of 1909 in a case like that of *Blake's Estate* (1) the view of Mr. Justice Meredith logically should be different from that which he entertained when framing an agreement under the Act of 1903, for it should be remembered that it is not an agreement under the Act of 1903, but an agreement under the said Act "as amended by this Act." It would seem to me that the whole effect of the argument so successfully addressed to the learned judge before the Act of 1909, would, since that Act, result in making it proper to insert in the agreement a provision analogous to sect. 24 (3). If that be the true position of affairs, I arrive at the conclusion that the agreement must be framed in accordance with the Act of 1903 as amended by the Act of 1909, and that the words, "As amended by this Act," can only operate in one way, namely, that as the Land Commission are placed in a different position, since the passing of the Act of 1909, with respect to the framing of an agreement, the Congested Districts Board are also placed in a different position. That is my view of the decision in *Blake's Estate* (1), and of the legislation in the Act of 1909 which followed that decision. I base my judgment on what I consider to be the incontrovertible trend of the Act of 1909, namely, to place the two bodies in the same position. I modify in my judgment the view that has undoubtedly been held with regard to the reasons of the learned judge in the decision in *Blake's Estate* (1).

HOLMES L.J.:—

I regret that I was not aware that judgment was to be delivered in this case to-day, otherwise I should have thought it right to reduce to writing the reasons for my judgment. I had, however, discussed the case with the Lord Chancellor some time ago, and I had come to the same conclusion as he has, and on the same grounds, namely, that when you take the Act of 1903 and the Act of 1909 together, the result of the two Acts of Parliament is that for the future there is to be a change in reference to this question of interest,

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and the Congested Districts Board and the Land Commission are now both in the same position, so far as the payment of interest on the purchase-money is concerned.

I do not think it is necessary for me to add anything more, for the Lord Chancellor has dealt exhaustively with every point.

MORIARTY L.J.:—

The question for determination in this case is whether the Congested Districts Board is bound, in the absence of agreement, in the case of a purchase effected by means of sect. 60 of the Act of 1909, to pay interest to the vendor at the rate of 3½ per cent., in addition to the purchase-money, from the date of the vesting order until distribution.

Mr. Justice Wylie answered in the affirmative, and decided that the Congested Districts Board was bound to pay interest at 3½ per cent., together with the purchase-money, and he arrived at this result by a process of reasoning that I consider altogether wrong, and I differ from him as to the result.

Blake's Estate (1), which was decided by Mr. Justice Meredith, decided that there was a liability on the Congested Districts Board to pay interest at 3½ per cent. from vesting till distribution, and that sub-s. 2 of sect. 24 of the Act of 1903 applied, and that sub-s. 3 did not apply.

Blake's Estate (1) was decided in 1904, and assuming that it was correctly decided, I proceed to consider whether the Act of 1909, operating upon the Act of 1903, has not effected a change. In my opinion the matter is now beyond all question. Whether I am right or wrong, I have no doubt, and I decide, that in the case of a sale under sect. 60 of the Act of 1909 the Congested Districts Board is not liable to pay more to the vendor at distribution than the purchase-money, and such interest as may have accrued on it from investment, if it has been invested; and that the provisions of sect. 26 of the Act of 1909, and sect. 24 (3) of the Act of 1903, apply to such a sale.

The Act of 1909 introduces new provisions in the case of the purchase of estates both by the Land Commission and the

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Congested Districts Board. For the first time compulsory powers of purchase are given to the Congested Districts Board. Now the present case is the case of a sale under sect. 60 of the Act of 1909, and sect. 43 of that Act must be read in conjunction with it. The words of sect. 60 are:—"(1) Where negotiations have been entered into or proposals have been made for the purchase under the Land Purchase Acts of any estate or untenanted land situated in a congested districts county, and no agreement has been arrived at, the Congested Districts Board may, if they think fit, send in the prescribed manner to the person who appears to them to be the owner a final offer in writing for the purchase of the estate or untenanted land. (2) The provisions of Part II of this Act with respect to the particulars to be inserted in a final offer sent by the Estates Commissioners shall apply in the case of a final offer sent by the Congested Districts Board under this section, with the substitution of the Congested Districts Board for the Estates Commissioners, and the provisions of Part II of this Act with respect to the acceptance of a final offer sent by the Estates Commissioners shall apply in the case of the acceptance of a final offer sent by the Congested Districts Board, with the substitution of sect. 79 of the Act of 1903 for sect. 17 of that Act. (3) If the final offer is not accepted in accordance with the foregoing provisions of this section, the Congested Districts Board may, if they think fit, send to the Estates Commissioners a requisition calling upon the Estates Commissioners to take steps to acquire the estate or untenanted land compulsorily in manner provided by Part IV of this Act." Now, sect. 43 has to be read in connexion with that section. In sub-s. 1 it sets out the circumstances in which the Estates Commissioners may proceed to make a final offer for the purchase of an estate not situated in a congested districts county. Sub-s. 2 sets out the particulars that this final offer must contain. They are:—(*a*) A description of the estate or untenanted land to which the offer relates; (*b*) The amount of the price which the Estates Commissioners are willing to give for the estate or untenanted land, subject to certain rights; and (*c*) The time within which the offer may be accepted. Then sub-s. 3 is in these terms:—"If within the time specified in that behalf in the final

offer, the offer is accepted in writing by any person who within the prescribed period satisfies the Estates Commissioners that he may be dealt with as the owner of the estate or untenanted land under sect. 17 of the Act of 1903, the offer and acceptance shall, as from the date upon which the Estates Commissioners certify that they are so satisfied, have the same effect as an agreement for the purchase of the estate or untenanted land under the said Act as amended by this Act, and the like consequences shall ensue, and the like proceedings shall be carried on, as in the case of such an agreement, save that the advance for the purpose of the purchase shall, notwithstanding anything to the contrary in this Act, be made by means of money and not by means of stock, except in cases where the vendor agrees to accept in lieu of cash an amount of guaranteed three per cent. stock equal in nominal amount to the sum to be advanced, and carrying dividends as from the date of the advance, and the Estates Commissioners agree that the advance shall be made in that manner." Sub-s. 4 provides that if the final offer is not accepted, the Estates Commissioners may, if they think fit, proceed to acquire the land compulsorily in the manner provided by Part IV of the Act.

It will be observed that the final offer contained in sect. 43 does not include an offer to pay interest at 3½ per cent. on the puachase-money from vesting till distribution, and in the absence of any express statutory provision imposing this obligation on the Congested Districts Board, I should consider it very doubtful that there is any power to make any offer substantially at variance with the offer prescribed by that section. But the question for determination is, in my opinion, otherwise so clear that I do not rest my judgment upon this.

By sect. 43 (3) the offer and acceptance have the same effect as an agreement under the Act of 1903, as amended by the Act of 1909, save that the advance for the purpose of the purchase shall, notwithstanding anything to the contrary, be made by means of money and not by means of stock. Now, supposing that *Blake's Estate* (1) was correctly decided, and that sect. 24 (2) did apply to a purchase by the Congested Districts Board, and that

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sect. 24 (3) did not apply; why is the application of sect. 26 of the Act of 1909 to be excluded? The words in sect. 43 (3) are, "the offer and acceptance shall . . . have the same effect as an agreement for the purchase of the estate or untenanted land under the Act of 1903 as amended by this Act." If it were a case of a purchase by the Estates Commissioners under sect. 60, sect. 26 would clearly apply, and I can discover no reason why sect. 26 of the Act of 1909 should not equally apply to the case of a purchase by the Congested Districts Board under sect. 60. Sect. 60 (2) is quite clear that the provisions of Part II of the Act of 1909 as regards the particulars to be inserted in a final offer sent by the Estates Commissioners shall apply in the case of a final offer sent by the Congested Districts Board under that section, and that the provisions of Part II shall also apply with respect to the acceptance of such final offer, with the substitution of sect. 79 of the Act of 1903 for sect. 17 of that Act.

It has been contended that the effect of sect. 79 (2) of the Act of 1903 is to apply sect. 24 (2), and to exclude sect. 24 (3), of the Act of 1903, and also to exclude sect. 26 of the Act of 190 I am unable to follow that argument. Sect. 79 (2) of the Act of 1903 deals only with the distribution of purchase-money, and with nothing else. It is in these terms:—"Where a vesting order is made in pursuance of this section the purchase-money shall be distributed by the Land Commission in like manner as if it were the purchase-money of land vested in the Commission, and all the provisions of Part I of this Act with respect to the distribution of the purchase-money of land so vested shall apply accordingly."

Sect. 24, sub-ss. 1 and 2, are not provisions dealing with the distribution of purchase-money. The interest to be paid by the Land Commission at 3½ per cent. from vesting until the distribution to the person in receipt of the rents of the lands at the date of the agreement for sale, is not a provision dealing with the distribution of purchase-money, and the 3½ per cent. interest which is claimed by the Congested Districts Board is not purchase-money. Indeed that was expressly admitted in argument by both counsel for the vendor. The provisions of sect. 24 which do relate to the distribution of purchase-money are sub-ss. 3 to 11, inclusive.

But even if I take too narrow a view of the meaning and effect of sect. 24 of the Act of 1903, as applied by sect. 60 (2) of the Act of 1909, the effect of sect. 26 of the Act of 1909 cannot be disregarded; and in my opinion sect. 26 is equally applicable to the Congested Districts Board and to the Land Commission, and the Congested Districts Board are entitled to pay the purchase-money into the Bank of Ireland and invest it, and the provisions of sub-s. 3 of sect. 24 of the Act of 1903 are applicable to the case of every sale to the Congested Districts Board where the purchase-money has been invested under sect. 26.

Now in the present case the money was put on deposit receipt at the express request of the solicitor for Lord Erne, who, as Mr. Justice Wylie states in his judgment, refused to have it invested otherwise. The loss in the present case amounts to only about £40, being the difference between the interest claimed at 3½ per cent. on the purchase-money, and the interest payable by the Bank on the deposit receipt; but the question involved in the decision of the present case may have serious consequences in other cases.

Mr. Justice Wylie's judgment seems to have been greatly affected by his assumption that sect. 18 of the Act of 1903 is expressly applied to the Congested Districts Board by sect. 56 of the Act of 1909, and that the Congested Districts Board are bound by the provisions of sect. 56 to pay interest at 3½ per cent. until the land is vested, and that the vendor should get further interest until he gets his money. Both counsel for the vendor—Mr. Macrory as well as Mr. Brown—expressly admitted that this assumption in Mr. Justice Wylie's judgment was not well founded, and that only so much of sect. 18 of the Act of 1903 as relates to rents and profits recoverable by the Land Commission was applied by sect. 56 to the Congested Districts Board.

Solicitors for the vendor: *R. A. Macrory & Son.*
Solicitor for the Congested Districts Board: *J. O'Connor.*

J. M.

Wylie J.
1914.

March 24.

Appeal.
1915.

June 15, 16.

1916.

Feb. 28.

IN THE MATTER OF THE ESTATE OF J. C. R. SCOTT.

Land Purchase Acts—Sale of Holding to Tenant—Holding comprising Bog—Right of Estates Commissioners to make Regulations giving Turbary Rights over Bog to Occupier in neighbourhood after Vesting Order or Fiat—Right to rescind or vary Regulations—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 21—*Interpretation Act*, 1889 (52 *&* 53 *Vict. c.* 63), *s.* 32, *sub-s.* 3.

In the case of the sale of an estate under the Land Purchase Acts, where portion of a holding consists of bog, and the purchaser had not an exclusive right of turbary before such sale, the power of the Estates Commissioners to make regulations under s. 21 of the Irish Land Act, 1903 (1), authorizing the cutting or making of turf on such bog by any occupiers of land in the neighbourhood of the holding for whose requirements such turf appears to be necessary, is not confined to the period prior to the vesting order or fiat, but such regulations may be made subsequent to the completion of the purchase, notwithstanding that there was no express reservation of turbary rights in the vesting order or fiat. The Estates Commissioners may from time to time rescind, amend, or vary such regulations.

In re King Harman's Estate, [1908] 1 I. R. 202, not followed.

Questions of law submitted by the Estates Commissioners for the decision of the Judicial Commissioner, under sect. 23 (1) of the Irish Land Act, 1903.

From the memorandum of the Estates Commissioners the following facts appeared :—

Prior to, and at the date of the sale, under the Irish Land Act, 1903, of the above-mentioned estate, Patrick Hennessey was entitled as tenant from year to year to a holding on the above estate,

(1) Irish Land Act, 1903, s. 21: "(1) In the case of the sale of an estate where portion of a holding consists of bog, and the purchaser had not an exclusive right of turbary before such sale, the Land Commission may make regulations authorizing the cutting or making of turf on that bog by any occupiers of land in the neighbourhood of the said holding for whose requirements such turf appears to be necessary, upon such terms, as to payment or otherwise, as may appear to them to be just, and those regulations may confer a right to enter upon any land for the purpose aforesaid."

shown on the sale map as No. 22, Lack, West, at a rent of £14 10*s.*, fixed by order of the Land Commission, dated the 5th October, 1883. This order declared that the said rent was fixed on the basis that the tenant was entitled to free turbary on the landlord's bog, but the said order was silent as to whether the holding of the said Patrick Hennessey was or was not subject to any turbary rights of third parties.

Prior to, and at the date of the said sale, Bridget Kelly was entitled as tenant from year to year to a holding, shown on the sale map as No. 18, Lack, West, at a rent of £26, fixed by order of the Land Commission, dated the 21st June, 1887. The said order was silent as to turbary rights.

Prior to, and at the date of the said sale, John Murphy was entitled as tenant from year to year to a holding, shown on the sale map as No. 24 Lack, West, at a rent of £16, fixed by order of the Land Commission, dated the 2nd November, 1901. The said order was silent as to turbary rights, but from particulars recorded in the pink schedule it appeared that a sum of 10*s.* was included in the rent in respect of "16 perches free turbary Lack, West."

At the time of the sale of the estate, the tenants referred to entered into agreements to purchase their respective holdings on the 1st November, 1907. The said three agreements were all silent as to turbary.

Subsequently the Estates Commissioners, pursuant to their powers under the Act of 1903, declared certain lands, including the said three holdings, fit to be regarded as a separate estate, and on the 9th January, 1915, made the requisite advances to the purchasers, and fiated their agreements.

Prior to the sale of the estate, Bridget Kelly and John Murphy, neither of whom had any turbary within the ambit of their holdings, had been provided with free turbary for the use of their respective holdings on the bog on Patrick Hennessey's holding by the vendor, whose bailiff gave them possession of banks. They continued to cut turf on Patrick Hennessey's holding up to 1912. In the turf-cutting season of that year, Patrick Hennessey permitted John Murphy to cut turf on his bog, but refused to permit Bridget Kelly to cut. In the turf-cutting season of 1913,

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Patrick Hennessey prevented both John Murphy and Bridget Kelly from cutting. There was on Patrick Hennessey's holding a large quantity of turf, which was considerably more than could be required for the use of his holding for a long period.

In consequence of the refusal of Patrick Hennessey to permit John Murphy and Bridget Kelly to enter upon and cut turf on his holding, John Murphy and Bridget Kelly instituted proceedings in the County Court against Patrick Hennessey for damages in respect of the loss sustained by them by reason of Patrick Hennessey unlawfully restraining them in manner aforesaid. The county court judge held that John Murphy was entitled as of right to cut turf on the holding of Patrick Hennessey, and awarded him £1 damages, and on appeal this decree was affirmed. In the case of Bridget Kelly, the county court judge dismissed the civil bill, and on appeal the dismiss was affirmed. Save as aforesaid, the legal rights of the tenants on the estate of the vendor to cut turf from any portion of the said bog, prior to or after the sale of the estate, had not been determined in any court of law.

The Estates Commissioners proposed, if they had power to do so, to make regulations, pursuant to sect. 21 of the Act of 1903, authorizing Bridget Kelly and John Murphy, for whose requirements turbary appeared to be necessary, to cut and make turf on the bog on Hennessey's holding for the use of their respective holdings, and also proposed, if they had power to do so, to set apart a suitable portion of the bog, sufficient for the use of Bridget Kelly and John Murphy, or such other occupiers of land in the neighbourhood who might come within the provisions of sect. 21, for some years, and to authorize Bridget Kelly and John Murphy, or such other persons as aforesaid, to enter on the holding of Patrick Hennessey to cut and make turf from such portion so set apart on payment by each or any of them each year of such a sum of money as appeared to the Estates Commissioners to be fair and just payment for such privilege, and also to provide that no other person should cut or make turf on the portion so set apart. The Estates Commissioners also proposed to provide that the cutting and making of turf by Bridget Kelly and John Murphy, or such other persons as aforesaid, should not

prevent the future reclamation of the bog, and that sufficient turf and pasturage should be left for the use of the proprietor of Hennessey's holding for a reasonable period, and further that Bridget Kelly and John Murphy, and any person entering on Hennessey's holding, under the authority of such regulations, should make reasonable amends and satisfaction for any damage done or occasioned thereby.

The following questions of law were submitted :—

1. Had the Estates Commissioners power, under sect. 21 of the Irish Land Act, 1903, to make regulations authorizing the cutting and making of turf on Hennessey's holding for the use of Bridget Kelly and John Murphy, or either of them, or for the use of any occupier of land in the neighbourhood? And,

2. If the answer to 1 was in the affirmative, had the Estates Commissioners power, and if so to what extent, subject to the provisions of the said section, to set apart a suitable and sufficient portion of bog for the exclusive use of Bridget Kelly and John Murphy, or such occupier of land as aforesaid, for such period of time as might appear to them reasonable?

Powell K.C., and *Edmund Meredith*, for the Estates Commissioners.

Hugh Kennedy for Patrick Hennessey.

Kenny K.C., for Bridget Kelly and John Murphy.

Longworth, for the vendor.

WYLIE J. :—

It appears to me that the object of sect. 21 of the Act of 1903 was to provide a way of getting rid of the difficulties arising in reference to turbary rights on holdings coming within the section, by enabling the Land Commission to make regulations as to the manner in which those rights were to be exercised. I have no doubt that, where such turbary rights exist, the Land Commission have power under the section to make regulations, otherwise where several tenants have turbary rights on a holding they would be in constant litigation. Turbary rights on a holding may have existed at the time the holding was vested, in which case they would be preserved by sect. 34 of the Act of 1896, or they may

Wylie J. 1914. *In re* Scott's Estate.

have been created as part of the terms of sale, as the Estates Commissioners would have full power to do, and expressly excepted by the vesting order. If such rights either did not exist, and accordingly would not be affected by sect. 34, or were not created as part of the terms of sale, and reserved by the vesting order, the Land Commission would have no power to make regulations under the section after vesting.

In *In re King Harman's Estate* (1), the Court of Appeal have put a limited construction on the general words contained in sect. 21, making it consistent with the statutory effect of a vesting order. But the basis of the decision in that case was that there were no existing turbary rights, and accordingly that the Land Commission, having vested the lands without creating or reserving any such rights, could not go back on what had been done. From a careful reading of the judgment of Lord Justice Holmes in that case, I do not think that he was of opinion that the Land Commission could not make regulations in respect of existing rights subsequently to a sale.

Under paragraph 5 of the fiated agreement in this case, the holding was vested in Patrick Hennessey "in fee-simple subject as hereinafter mentioned, and as provided by the Irish Land Act, 1903." In other words, the holding was vested in him in fee-simple subject to any easements, rights, and appurtenances preserved by sect. 34 of the Act of 1896, and to the provisions of sect. 21 of the Act of 1903, as to the making of regulations. By a decree in the County Court, which was affirmed on appeal, John Murphy has established that he has an existing right to cut turf on Hennessey's holding. That is a right which has been preserved by sect. 34 of the Act of 1896, and Hennessey must be taken to have purchased the holding subject to that right, and to the similar rights of any other persons which may be proved to have existed at the time of sale, and further, as decided by Mr. Justice Molony on appeal, subject to any regulations to be made by the Land Commission under sect. 21.

I accordingly hold that the Land Commission have power to make regulations with reference to the turbary rights of John Murphy on Patrick Hennessey's holding. But, inasmuch

(1) [1908] 1 I. R. 202.

as John Murphy is the only person who up to the present has established his right to turbary on the holding, I think that the case is hardly yet ripe for regulations. I do not think that the Land Commission should make regulations unless upon the application of some person interested. The case is at present confined to two parties, and neither Hennessey nor Murphy applies that regulations should be made.

I answer the questions submitted as follows:—1. "No, in respect of Bridget Kelly. Yes, in respect of Thomas Murphy, and such other persons as may establish a right to cut turf on Hennessey's holding." And 2. "Yes, in the case of Thomas Murphy, and such other persons as above, but in accordance with the right established, and subject to the provisions of the said section."

J. E. W.

1915.
June 15, 16.

The Estates Commissioners, and also Bridget Kelly and Patrick Hennessey, appealed (1).

Jellett K.C. (with him *Powell K.C.* and *Edmund Meredith*), for the Estates Commissioners:—

I contend that the power of the Land Commission to make regulations as to turbary on holdings under sect. 21 of the Act of 1903 is not confined to cases where the fiat or vesting order reserved the turbary, and that such regulations may be made at any time prior to or after the completion of sales. Otherwise a grave economic problem will certainly arise in many parts of the country owing to one tenant being possessed of quantities of turf far in excess of his own requirements, while neighbouring tenants may have none. I further contend that the position of Bridget Kelly, who failed to establish any right to cut turf on Hennessey's holding prior to the sale to the latter, in no way differs from that of

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN L.C., CHERRY L.C.J., O'CONNOR M.R., PALLES C.B., and RONAN and MOLONY L.JJ. The Appeal was first argued on the 11th, 12th, 15th, and 16th February, 1915, before O'BRIEN L.C., and MORIARTY and RONAN L.JJ., and was ordered to stand for re-argument before the full Court.

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Murphy, who did establish such a right, so far as relates to the benefit of regulations under sect. 21. The power conferred on the Land Commission by sect. 21 is general; it is one to make regulations authorizing the cutting or making of turf "by any occupiers of land in the neighbourhood of the holding for whose requirements such turf appears to be necessary." The benefit of the section is thus not limited to tenants who can establish pre-existing easements or privileges under sect. 34 of the Act of 1896. It is necessary to consider the position of agricultural tenants with regard to turbary on their holdings prior to the Act of 1903. Sect. 29 of the Landlord and Tenant Act (Ireland), 1860, empowered tenants under any lease or demise (words which include a yearly tenancy) made on or after January 1st, 1861, of lands containing turf bog, unreclaimed and unprofitable for agriculture, unless by the lease it be provided to the contrary, to cut and use the turf bog so far as necessary for bona fide use on the demised premises of the tenant and his lawful sub-tenants, but not for any purpose of trade or manufacture, or for profit or sale.

Section 5, sub-s. 5, of the Land Law (Ireland) Act, 1881, conferred a new power on a landlord, where a fair rent had been fixed in respect of a holding containing turf bog, to authorize another tenant on the estate to enter on the bog and take turf therefrom, although no such right previously existed: *Townshend* v. *Cotter* (1). The landlord could not, under this section, interfere with the rights already vested in the tenant under sect. 29 of the Act of 1860 to cut turf bona fide required for use on his holding, but the tenant's right was still confined to what was so required. Sect. 4 (1) of the Turbary (Ireland) Act, 1891, provided that where a holding for the purchase of which an agreement has been entered into by a tenant, comprises a bog which is subject to a right of turbary exercisable by persons other than the purchaser, "the Land Commission on the prescribed application may make regulations for the purpose of securing that the exercise of the right shall not prevent the future reclamation of the bog, and that such persons shall have reasonable facilities for the exercise of the said rights." By sect. 5 it is provided that the

(1) 29 L. R. I. 243; 31 L. R. I. 86.

Act shall apply where holdings have been purchased, "whether before or after the commencement of this Act," provided that where the purchase was prior to the Act the regulations were to be made only on the application of the proprietor of the holding. In cases of sale after the Act, accordingly, the regulations may be made by the Land Commission without any application from the proprietor, and after vesting order or fiat. This was not a power to create or give new rights over the purchased holding, but it is important to observe that from 1891 the Land Commission had this power of making regulations to ensure reasonable facilities for the exercise of existing rights, and that notwithstanding the making of the vesting order or fiat.

Section 34 of the Act of 1896 preserves, after the vesting of a holding, the continuance of previously existing easements, rights, and appurtenances, and any privilege previously in fact enjoyed, whether by permission of the landlord or otherwise, in such manner and for such time that, if the holding had belonged to a different owner from the rest of the estate, it would have been an easement or right. Having regard to the position of a tenant under these sections; his limited right to turf on his holding; and the clear intention of the Legislature to preserve the right (if any) of others to such turf, one would expect that on a purchase of the fee-simple by an occupying tenant, he would acquire the fee in what he had before, not in something he had not, as is contended by the respondent. In effect, sect. 21 of the Act of 1903 keeps the matter open, and although a vesting order or fiat may, in the first place, vest the bog on his holding in the purchasing tenant, it does so subject to the right of the Land Commission to make regulations pursuant to sect. 21 of the Act of 1903. This right is analogous to that of a landlord under sect. 5 of the Act of 1881 to send in other persons authorized by him, but is more limited, as the landlord could send in anyone he liked. There is no hardship on the tenant, as the regulations are to be made by the Land Commission "upon such terms, as to payment or otherwise, as may appear to them to be just."

It is to be observed that sect. 24 of the Labourers (Ireland) Act, 1906, places an agricultural labourer who is tenant to a district council of a plot or allotment under the Labourers Acts

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in the neighbourhood of such holding as is referred to in sect. 21 of the Act of 1903 in the same position for the purpose of turbary as an "occupier of land" in that neighbourhood. Such labourers had no prior existing right; the qualification is being tenant to a district council, and requiring turf. It is obvious that regulations authorizing such occupiers to enter and cut turf upon the holdings of tenants who have purchased can be made at any time.

I ask that, if necessary, *King-Harman's Estate* (1) be overruled, but the present case is distinguishable, as it is a zone case within sect. 1 of the Act of 1903. Here the sale was carried out pursuant to an agreement between the landlord and tenant to which the Land Commission were not and could not have been parties. They never saw the agreement until it was completed, and in due course they were bound to advance the money. The overriding power of the Land Commission to make regulations cannot depend upon the volition of the landlord and tenant, one of whom is absolutely disinterested in the question of the reservation of bog, while the other would be keenly adverse to any term of the agreement which would empower outsiders to enter on his holding. The power is one to be exercised for public purposes after the agreement is completed, and it is one vitally affecting the question of security for the advance. If the purchasing tenant acquires the uncontrolled fee in the turf, he could sell it all off, although before the sale he had only the right to consume it for the purposes of his holding. My contention does not involve that the ownership of the turf remains in the landlord or becomes vested in the Land Commission. The vesting order or fiat may comprise the turf, but subject to this, that the Land Commission may subsequently make regulations taking it away again. That is a compulsory power analogous to the compulsory powers given to other public bodies. As Lord Justice Moriarty remarked during the earlier argument, a Landed Estates Court Conveyance does not preclude the operation of sect. 162 of the Grand Jury Act, 1836.

Further, the tenant agrees to purchase under the provisions of the Irish Land Act, 1903, and the holding is vested in him

(1) [1908] 1 I. R. 202.

subject to the provisions of that Act, of which sect. 21 is one; he therefore buys expressly subject to sect. 21 and to the right of the Land Commission to make regulations thereunder.

The effect of a vesting order or fiat prior to the Act of 1903 was regulated by sect. 8 of the Purchase of Land (Ireland) Act, 1885, and sect. 31, sub-sect. 2, and sect. 32 of the Land Law (Ireland) Act, 1896. Section 16 of the Act of 1903 attaches claims formerly affecting the lands to the purchase-money, but the power of making regulations conferred by sect. 21 is not affected by this; it is a power which before the sale did not affect the lands, and in no case could it attach to the purchase-money. It must remain as an overriding power affecting the holding subsequent to purchase. Under sect. 32, sub-s. 1, of the Interpretation Act, 1889, where an Act passed subsequent to that statute "confers a power or imposes a duty," the power may be exercised and the duty shall be performed from time to time as occasion requires. I ask the Court to place such a construction on sect. 21 as will render it an effective and operative section, which it cannot be if confined to the period prior to vesting: see *Curtis* v. *Stoven* (1).

[RONAN L.J.—It would be as unjust, if there be an injustice, to put the section into operation between the date of the contract and the vesting order, as afterwards.]

There can be no injustice if the Land Commission impose terms as mentioned in the section. In addition, a tenant who purchases under this code does not acquire an ordinary fee-simple estate which he can deal with as he chooses. As to this it is only necessary to refer to the provisions of sect. 30 of the Act of 1881, sect. 8 of the Act of 1885, sect. 34 of the Act of 1896, and sect. 54 sub-sects. 1, 2, 3, of the Act of 1903. What is acquired by a purchasing tenant is only a statutory fee-simple, the incidents of which are to be ascertained from the statute authorizing the sale. See judgment of FitzGibbon L.J., in *In re M'Naul's Estate* (2), where he says:—"We hold, in general, that the doctrine of repugnancy applicable at common law to an estate in fee is modified, in the case of fee-farm grants founded on renewable leases, by whatever obligations are lawfully inserted in the grants."

(1) 22 Q. B. D. 513, at p. 517. (2) [1902] 1 I. R. 114, at p. 124.

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Thus the doctrine of repugnancy applicable to an estate in fee created under the Act of 1903 must be modified by whatever the statute annexes to the fee as incident to it. In *King-Harman's Estate* (1) the judgment of Wylie J., was in favour of my contention. The judgment of the Court of Appeal, overruling that decision, proceeded on the basis, in the words of Sir Samuel Walker C., that "it was quite open to the Estates Commissioners, under sub-sect. 2 of sect. 34, to have reserved a right against Acheson" (the purchasing tenant), "but this was not done." That may have been so in cases of purchase by the Estates Commissioners under sect. 6, but not in zone cases under sect. 1. My contention, that the power of making regulations is analogous to a power of compulsory purchase, does not appear to have been put before the Court on that occasion.

M. J. Kenny K.C., for Bridget Kelly, supported the argument of Jellett K.C.

Hugh Kennedy (for Poole Hickman, serving with His Majesty's forces), for Patrick Hennessey:—

I rely on *King-Harman's Estate* (1), which I submit was rightly decided, and should not be overruled. No doubt this Court has power to overrule that decision, but inasmuch as to do so would affect the title in the case of numerous bought-out holdings, the power ought not to be exercised: see *Mills* v. *Jennings* (2). My contention shortly is that the Land Commission has no power to make regulations as to turbary under sect. 21 of the Act of 1903, subsequent to the vesting order or fiat, where such is silent as to turbary rights. The frame of the Act of 1903 is important in this respect. Sections 1–23 of the Act are complete in themselves, and provide the entire machinery for taking the holding out of the hands of the landlord and vesting it in the purchasing tenant. They deal with all matters from the agreement to the vesting order, and with nothing beyond the vesting order, with one exception, and that a matter almost certain to arise at the moment of vesting, namely, boundary disputes. The Estates Commissioners are the executive who, under the control of the Lord Lieutenant, carry through these operations,

(1) [1908] 1 I. R 202. (2) 13 Ch. D. 639, at p. 641.

terminating in the vesting of the holding, when that executive, as such, becomes *functus officio*, and the "purchasing tenant" becomes the "proprietor" of the holding, subject to a mortgage to the Land Commission, who have certain rights protecting their security for the advance made. This scheme of the Act is judicially recognized in *In re Kemmis's Estate* (1) and in *In re Talbot Crosbie's Estate* (2).

The one exception to this powerlessness of the Estates Commissioners subsequent to vesting, viz., the power to determine disputes as to boundaries, is a power conferred upon them as arbitrators, and only "at the request of the parties interested." The relations which, prior to vesting, obtained between the Estates Commissioners and the purchasing tenant then become relations between the Land Commission and the proprietor of the holding, e.g., sect. 54 is prefaced by the words not "In the case of the sale of an estate," but "As between the Land Commission and the proprietor for the time being of any holding," etc. The Estates Commissioners, as such, disappear, and with them the administrative and executive powers conferred upon them by the statute, and which they alone can exercise, including the powers of making regulations under sect. 21. The opening words of sect. 21, "In the case of the sale of an estate," refer to a period when the sale is an open matter, not to a subsequent period perhaps fifty years after the completion of the sale. Section 21 applies "where portion of a holding consists of bog," etc.; "holding" is defined by sect. 57 of the Act of 1881 as "a parcel of land held by a tenant"—words which include not only the soil, but also all appurtenances attached to it: see *Ex parte Hutchinson* (3). Reliance has been placed on this being a zone case, but no such case can be a zone case. Section 21 only applies where "the purchaser had not an exclusive right of turbary before the sale." But if the landlord's rights over the bog are vested in the purchasing tenant by the vesting order or fiat, the purchase is of a different and greater thing than the "holding subject to a judicial rent," mentioned in sect. 1 of the Act of 1903, and the case is at once outside the zones.

(1) [1904] 1 I. R. 496, at p. 507.
(2) [1905] 1 I. R. 570, at pp. 572, 573.
(3) 12 L. R. Ir. 79, at p. 87.

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There are many arguments against the powers conferred by sect. 21 being regarded as powers of compulsory acquisition. The scheme of the Act is to vest the lands in the purchasing tenant once and for all, and the Act is framed for this purpose. Why have a vesting and a subsequent divesting? If this extraordinary power of compulsory acquisition was intended to be conferred, why should it be restricted to cases where the purchaser had not an exclusive right? Further, it would be unprecedented that such powers should be conferred without provision being made for the assessment of compensation by a tribunal before whom the party being deprived of his property could appear and be heard. Here it is said that Hennessey, having purchased his holding on certain terms, can be deprived of an important part of it, subject only to the Land Commission making such terms as to payment as appear to them to be just, the owner being unheard. There is no time-limit mentioned in the action. Is the power to continue for the duration of the annuity, or can the Land Commission come in after its cesser by redemption or otherwise? If they can do so, it is a clear derogation from the Parliamentary title afforded by the vesting order or fiat: see *Leonard's Estate* (1); *Hussey's Estate* (2); and *Wilson's Estate* (3). These lands were registered compulsorily under the Local Registration of Title (Ireland) Act, 1891, sect. 22; but the alleged right of the Land Commission, which, if it exists, is clearly a burden on the lands, is neither registered nor is it a burden which, without registration, is declared by that Act to affect the lands. It is submitted that the land certificate is conclusive in this respect.

Cur. adv. vult.

1916. Feb. 28.

SIR IGNATIUS J. O'BRIEN L.C.:—

The Lord Chief Baron has authorized me to say that he agrees in the decision arrived at by the Court, but expresses no opinion whatsoever with regard to the question adverted to in my judgment as to what should be the basis of the amends to be made to the tenant if turf was taken from his lands.

This case came before the Court of Appeal in Easter Sittings

(1) [1912] 1 I. R. 212.
(2) [1912] 1 I. R. 473.
(3) 42 I. L. T. R. 122.

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on three appeals from rulings of Mr. Justice Wylie upon the construction of sect. 21 of the Land Law (Ireland) Act, 1903, affecting the holding of Patrick Hennessey, situate in the county Clare, on the estate of J. C. R. Scott; the Estates Commissioners contending that the learned Judge took an erroneous view of his powers under this section in dealing with turbary on the holding of Patrick Hennessey, which was purchased by him under the Irish Land Purchase Code, and vested in him by force of fiat. An appeal was also taken on behalf of another tenant on the estate, named Bridget Kelly, who contended, both on her own behalf and on behalf of other tenants, that the learned Judge was wrong in holding that she and they did not come within the provisions of sect. 21 in respect of the turbary on Hennessey's holding; while Hennessey served a cross-appeal claiming that the turbary on his holding could not be interfered with by any regulations which the Estates Commissioners had power to make under this section.

After the case had been at argument for some time, counsel on both sides having been heard, it became manifest that the questions argued on behalf of the Land Commission and Bridget Kelly were such that they could not be satisfactorily determined without re-consideration of the judgment of the Court of Appeal in *King-Harman's Estate* (1). Counsel for Hennessey contended that, so long as the judgments in that case remained unqualified, the decision of the Court must be in his favour, and against the contention of the Estates Commissioners, and also against the tenant who had appealed, and, consequently, against any similar contention which might be made on behalf of tenants whose holdings adjoined Hennessey's.

For the Estates Commissioners it was argued that the present case, which dealt with holdings purchased under the 1st section of the Act of 1903, could be distinguished from the case of holdings purchased by the Land Commission and re-sold to the tenants under sect. 6; but the Court, consisting of myself, the late Lord Justice Moriarty, and Lord Justice Ronan, were disposed to think that the judgments in *King-Harman's Estate* (1) would apply to the present case, and that if there was to be a

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decision in favour of the Estates Commissioners in the present case, the whole question would have to be re-considered by the full Court.

Of course, if an appeal lay to the House of Lords from the decision in *King-Harman's Estate* (1), such an appeal would be the only mode of settling the question at issue, but as the judgment of the Court of Appeal, where it is given on appeal from rulings of a Judicial Commissioner on questions of law submitted to him by the Estates Commissioners, is final, it can be reviewed and in substance reversed by the Court itself, where the full Court of Appeal has had an opportunity of re-consideration.

It appeared to me, and I think to the other members of the Court, that the attention of the Court of Appeal had not been directed to all the sections of statutes bearing on this question, and that if the argument now addressed to the Court had been addressed to the judges then sitting, they might have arrived at a different or modified conclusion.

It appeared to us that counsel on both sides had argued *King-Harman's Estate* (1) entirely on the limited construction of the sections dealing with vesting orders and fiats, and that vital considerations on sect. 21 had been passed over.

While the present case deals with a very small holding, the matters of principle involved are of vital importance to the smooth and successful operation of the Land Purchase Code in many parts of Ireland, and as it was desirable, owing to the large public issues involved, that there should be a thorough examination of all the principles of law involved, more especially those not dealt with by the previous decision, the full Court has been assembled, and the case has been argued by counsel for the Commissioners and Bridget Kelly on the basis that in so far as the judgments in *King-Harman's Estate* (1) prevent the Estates Commissioners' contention being yielded to, they must be overruled.

I need hardly say that it is with the greatest hesitation that I venture to criticize or differ from any conclusion which may have been arrived at by three such eminent judges as Lord Chancellor Walker, Lord Justice FitzGibbon, and Lord

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Justice Holmes; and when I say at the outset that I find it impossible to acquiesce in the ultimate result of the decision in that case, I desire also to express the opinion that if the arguments which have now been addressed to us had been addressed to those learned judges, their ultimate conclusion would have been different. I say ultimate conclusion, because I do not think that their general view as to the effect of vesting orders can really be questioned. Their conclusion appears to me to be erroneous only in so far as it seems to decide that sect. 21 can have no operation after vesting order or fiat unless the vesting order or fiat deals with turbary in the form of exclusion from the subject-matter of the statutory conveyance.

I shall first deal with the question apart from the judgments of the Court of Appeal in *King-Harman's Estate* (1), and as if that decision had not been arrived at.

The material facts involved are few. Patrick Hennessey, John Murphy, and Bridget Kelly were tenants on the estate of J. C. R. Scott, and their holdings, with other holdings, were declared by the Estates Commissioners fit to be regarded as a separate estate for the purposes of the Land Purchase Acts, with a view to a sale to the occupying tenants. Hennessey held as tenant from year to year under a fair rent order of the 5th of October, 1883, at a rent of £14 10*s*. The order fixing the fair rent was silent as to whether the holding was or was not subject to turbary rights of third parties; it contains a large quantity of turf, about 6 acres of high bog 15 feet deep, and 12 to 14 acres of cutover bog, varying in depth from 2 to 5 feet, and it was found as a fact that the bog is much more than would be required for the use of Hennessey's holding for a long period. Neither Bridget Kelly nor John Murphy prior to the sale had any turbary within the limits of their holdings, but had been provided with turbary by the landlord on the bog of Patrick Hennessey. After his holding had been vested in him, Hennessey refused to permit either Murphy or Bridget Kelly to cut turf. John Murphy was able to establish, by civil bill process, his claim to cut turf as of right on the holding of Patrick Hennessey, and that it was such a right as was preserved by the Land Purchase

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Acts through the fiat, but Bridget Kelly was not able to establish any such right, and her attempt to obtain judicial sanction for it was disallowed both by the county court judge and on appeal.

Under these circumstances the Estates Commissioners submitted two questions for the decision of the Judicial Commissioner:— First, have the Estates Commissioners power under sect. 21 of the Irish Land Act, 1903, to make regulations authorizing the cutting and making of turf on Hennessey's holding for the use of Bridget Kelly and John Murphy, or either of them, or for the use of any occupier of lands in the neighbourhood? Secondly, if the answer to this question is in the affirmative, have the Estates Commissioners power, and, if so, to what extent, subject to the provisions of the said section, to set apart a suitable and sufficient portion of bog for the exclusive use of the said Bridget Kelly and John Murphy, or such occupier of land as aforesaid, for such period of time as may appear to be reasonable?

It has been explained to us at the Bar that the main object of the second question was directed to the possibility of the Commissioners finding it necessary to vary from time to time such regulations as they might lawfully make, and they doubted whether their jurisdiction might not be to make a set of regulations once for all, which, of course, would be an inconvenient, and in many cases an impossible, course, inasmuch as experience in the past has shown that regulations made with regard to cutting of turf, quite satisfactory at one point of time, might become unsatisfactory, and it is essential in the interest of all that they should be altered at a future date.

Mr. Justice Wylie, who, of course, felt bound by the judgments in *King-Harman's Estate* (1), dealt with the questions in this way: he held that the case came within sect. 21, inasmuch as he considered that the purchaser had not an exclusive right of turbary before the sale, because John Murphy had a right to cut turf from his bog; but he was of opinion also, having regard to the decision of the Court of Appeal, that, while there was power to make regulations with reference to the turbary rights of John Murphy on Patrick Hennessey's holding, there was no power to extend these to neighbouring tenants, save such as might after-

(1) [1908] 1 I. R. 202.

wards establish a similar legal right, and, as the matter was reduced merely to the relations of John Murphy's and Patrick Hennessey's holdings, he did not see an immediate necessity for making regulations.

Mr. Justice Wylie's answer was "no" in respect of the said Bridget Kelly; "yes" in respect of the said John Murphy, and such other persons as may establish a right to cut turf on the said Patrick Hennessey's holding; and, as to the second question, he answered "yes" in the case of the said John Murphy and such other persons, as above, but in accordance with the right established, and subject to the provisions of the said section.

To arrive at a conclusion with regard to this appeal it is essential to consider the position of this holding minutely.

Under the Landlord and Tenant Act, 1860, sect. 29, the position of unreclaimed bog on Hennessey's holding was this, that Hennessey could cut turf for his own bona fide use on the premises, but not for any purpose of trade, manufacture, or for profit or sale, unless such right was given by the landlord. What may have been the position of Hennessey or his predecessors in title at the time of the fixing of the fair rent on his holding with regard to the adjoining tenants we do not know, nor is it necessary for the purposes of our decision to inquire; but the position, so far as the landlord is concerned, when the rent was fixed, is perfectly clear and settled by sect. 5 of the Land Law (Ireland) Act, 1881, and was this, that the landlord, making reasonable amends and satisfaction for any damage to be done or occasioned thereby, had the right to enter on the holding for the purpose of cutting or taking turf, with power to remove it. Whatever may have been the area of the land comprised in the tenant's holding, this power of the landlord, it is clear, could be exercised by him for the benefit of any other tenants on the estate, and, in fact, it was exercised by him in respect of this tenancy of Hennessey's for the benefit of other tenants.

Under the Act of 1881 the great problem of Irish land tenure was dealt with mainly on the lines of giving fixity of tenure to occupying tenants, and regulating their relations with their landlords in reference to the terms of the tenure, and sect. 5 legislates, not only in respect of this question of turbary, but with regard to

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other important matters, to which I shall presently refer, but so far as turf is concerned, by giving the landlord an overriding control over the turbary which, it may be presumed, would be for the most part exercised for the general benefit of the estate and the other tenant occupiers, although the landlord's rights were not in terms so controlled.

In addition to this question of turbary there were reserved to the landlord rights of mining and taking minerals, quarrying, or taking stone, marble, &c.; and also the rights of hunting, shooting, fishing, and taking game; while special provisions are introduced for the retention of the landlord's rights in respect of mines, coal, and coal-pits.

So far as mineral, mining, and sporting rights are concerned, except in exceptional cases and for very limited purposes, adjoining tenants would hardly have any expectation of benefit to themselves by reason of the reservation in so far as it affected any particular holding; but in so far as it affected turbary rights anyone who knows the country must be aware that in remote districts the very existence and the lives of tenant occupiers might be dependent upon a fair and judicious exercise of the powers which landlords retained in respect of turbary on the lands owned by them. In some cases holdings included large tracts of bog, the only source of fuel in the district. Frequently in these districts other sources of fuel might be regarded as practically non-existent, and landlords to a great extent, if not exclusively, used their powers under the Act of 1881 by making special regulations and reservations for the benefit of neighbouring tenants; regulating by means of the issue of bog tickets the places where the turf might be cut and the extent to which it might be removed from the land, so as to prevent the bog being entirely cut away and unfair damage being done to the holding. The balance, by these regulations, was preserved between the interest of the tenant who was not paying rent for mere bog and those whose necessity compelled them to appeal to the landlord to give them rights of obtaining fuel outside their holdings. I lay stress upon this because I think it is quite clear, when all the statutes are carefully examined, that the Legislature never lost sight of the necessity of dealing in some like way with this important question of turbary after purchase and vesting.

The general policy of the Act of 1881 was, as I have said, in the main directed to the preservation of the relation of landlord and tenant, but with the Act of 1885 commenced the first of a series of statutes the dominant intention of which was to convert the occupying tenants into occupying owners, the necessary moneys for this purpose being advanced by the State. As time went on this policy received higher development, and in the code terminating with the Irish Land Act of 1909 we have a body of legislative enactments necessarily often difficult to construe, but the difficulties I think largely disappear if we keep in mind the underlying policy of the Legislature.

In the first place, it was intended that whatever had constituted the holding of the tenant prior to purchase should become his property, not as tenant but as owner, and the parcel of land which formed his holding was to be acquired by him in fee simple. The property which he had as an occupying tenant was subject to rights and powers and restrictions, some of which it would be quite possible to transfer to a fee, but others which it might be impracticable to annex to an estate in fee simple; and accordingly, in addition to what was comprised in his holding, it was obviously intended that he should get a great deal more, and this is effected in the first instance, and apart from restrictions, by the provisions of sect. 8 of the Act of 1885, which provides that every order purporting to vest a holding which purports to be made by the Land Commission in exercise of the powers conferred on them shall be binding upon all persons claiming any estate or interest in the land comprised in the holding, including Her Majesty, her heirs, and successors, and shall be as effectual in all respects, save as thereinafter provided, as if it were a conveyance or assignment executed by one of the Land Judges of the Chancery Division of the High Court of Justice in Ireland under the Landed Estates Court Act.

For the purpose of preventing what might cause delay in the ascertainment of all restrictions to which the fee was to be made subject in so far as easements were concerned, and to prevent injustice being done by oversight, sect. 34 of the Act of 1896 provided that where a holding was vested it should continue to have appurtenant thereto and be subject to any previously existing

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easements, rights, and appurtenances; it converted what had been in law only privileges into easements, so that they should not be lost, and it gave power to the Land Commission, if they thought fit, to declare that the sale was made subject to or free from any particular easement.

By sect. 8 of the Act of 1885, already referred to, the purchaser also takes subject to any rights or equities to which the holding had been subject prior to the purchase, which is deemed to be a graft on the previous interest. As a matter of conveyancing there can accordingly be no doubt whatsoever upon the effect of the statutory vesting, whether it be by vesting order or fiat; it carries the fee-simple in the land, and everything except what the vesting order itself or the statute by its express terms excludes; and if this case merely depended upon the effect of the vesting order or fiat (which is all that I can find argued in *King-Harman's Estate* (1)), I should find myself constrained to hold against the contention of Mr. Jellett.

Although suggested, it cannot, I think, be seriously argued that whatever rights of turbary the landlord had at the time of the sale in this case are retained by him. They are not reserved by any section of the Act, or excluded from the vesting order or fiat; they do not vest in the Land Commission, the transaction not being one under sect. 6 of the Act of 1903; and they are conclusively and clearly affected by the general provisions of sect. 8 of the Act of 1885, and the other sections dealing with vesting.

The right which the landlord had of cutting turf on the tenant's holding is clearly gone from him, and does not remain outstanding in any person other than the purchasing tenant. Of course this has nothing to say to the matter of such rights as are preserved by sect. 34 of the Act of 1896: hence Murphy's claim against Hennessey in the present case comes within the protection of sect. 34, and is not affected prejudicially by the fiat; but with regard to the rights previously vested in the landlord, so far as they are an interest in the land, they have gone from him. To this extent, and so far as it deals merely with the conveyancing effect of a fiat or vesting order, there is nothing that I could differ from in the judgments of the Court in *King-Harman's Estate* (1);

in effect, however, that case left the investigation just at the point where I think it requires to be taken up.

Going back to the general policy of the Act, we have noted that the 5th section of the Act of 1881 dealt with mines, minerals, coal, and so forth in a manner suitable and appropriate to a condition of things in which the tenant's legal position was only that of a tenant from year to year. It is manifest that the framers of the statute foresaw the necessity of legislating for these subject-matters when the fee-simple of the lands comprised in the holding should become vested in the tenant-purchaser.

Section 13 of the Act of 1903 deals expressly with sporting rights and the right of mining and taking minerals. Sporting rights may either be reserved to the vendor expressly, or in the absence of agreement shall vest in the Land Commission to be dealt with by them subject to regulations to be made by the Lord Lieutenant, while in the case of sales by the Land Commission, or of land comprised in an estate by the owner of the estate, the exclusive right of mining and taking minerals and digging and searching for minerals is reserved to the Land Commission, to be disposed of in manner thereafter to be provided by Parliament. It is unnecessary to follow in detail the provisions of the section; it is enough to note that they are expressly legislated for.

By sect. 99 special provision is made as regards mineral and sporting rights, mines and quarries worked by the vendor at the time of the sale, and a right to water-power in use by the vendor at the time of the sale; and every vesting order is to the extent of that section affected by that section; so also with regard to sect. 16.

When, however, we come to deal with turbary, there is an absence of this class of provision which operates by means of exception from or qualification of the estate which the vesting order gives to the tenant. The most elementary knowledge of the condition of this country would bring to the mind of anyone drafting an Act of Parliament dealing with land that while mines and minerals and sporting rights were matters of importance, the regulations of the user of turbary might prove to be a question far more real in many cases, having regard to the

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welfare of the purchasing tenant and the smooth working of the Land Purchase Acts. If the effect of the statute was suddenly to render unavailable at the absolute and unrestricted will of a few purchasing tenants the large tracts of turbary which might be included in their holdings, and which the landlord had previously regulated for the benefit of the estate, consequences of the most serious and disastrous character might result.

In zone cases, of which the present is typical, the purchase-money advanced to the tenant represents nothing except a sum fixed with reference to the rent existing and payable at the date of the purchase. The tenant, in my opinion, cannot be regarded as paying money for the turbary as a possible commercial commodity. As a matter of conveyancing he gets the land of which the turbary forms part, but no grave injustice would be done to him by provisions, if they do exist, by which he would have to yield (as before the purchase he might have had to do) for the benefit of neighbouring holders, rights over turbary on his holding, especially if the Legislature provided means of elastic and ample character to compensate him for any injury or loss he might sustain—in short, if, by means of what are in effect compulsory powers of purchase from him on fair terms, he may be forced to part with portions of this turbary which in the first instance were conveyed to him.

In sect. 21 of the Act of 1903, on its true construction, I conceive that I find this class of legislation, which, indeed, I should have expected to find in any code so radically altering the tenure of land in the country, and I think that I find the matter dealt with on the legislative lines which would be appropriate.

The first question to be determined on the construction of sect. 21 is, what is the "exclusive right of turbary," in the case of a sale of an estate where portion consists of bog, that was contemplated? It has been argued that the exclusive right of turbary means a case where some adjoining tenant, and not the landlord, had a right of cutting turf on a tenant's holding; and in a case where, so far as one can see like the present, only one tenant had such a right of turbary, it is suggested that the Land Commission might put into operation the elaborate machinery which the section contemplated, for the purpose of regulating this right of turbary—for what good purpose I cannot conceive.

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Section 34 of the Act of 1896 preserves such a right to its fullest extent. It was not a class of right with which prior to the purchase the landlord would under normal conditions interfere at all, and the ordinary law and the civil-bill Court would be ample to deal with such a simple case, or even with the case of several tenants having a legal right to cut turf on another man's land as appurtenant to their holdings. I cannot take this restricted, and to my mind scarcely intelligible, view of the section, when good sense, and what I conceive to be the clear meaning of the statute, point to the really serious and important subject-matter, namely, cases where, at any rate, fair rent orders had been made, and were in force at the date of the purchase; where the right of turbary was reserved by force of the law to the landlord; and where the tenant was restricted to cutting only so much as was necessary for his own domestic needs. We here get an intelligible and serious subject-matter to be operated on by the Legislature; that to my mind is clearly the case which was contemplated by the first sub-section of sect. 21, and I conceive that it applies in every case where sect. 5 of the Act of 1881 regulated the relation of landlord and tenant, and accordingly in every case of purchase within the zones, as it is called, being cases where the landlord had the right of entering and cutting and taking turf on a tenant's holding.

Once I am satisfied that this is the class of case to which the section applies, I think I get on the way to a true appreciation of the provisions dealing with the powers of the Land Commission.

While I confine my judgment to the case of tenants under sect. 5, I am not to be taken as saying that it cannot apply to other cases, but I wish to confine my judgment to what is strictly necessary for the purposes of the case before us.

The regulations which are to be made must be regulations with regard to the subject-matter of the section, namely, the turbary on the holding, and may authorize the cutting and making of turf on that bog by any occupiers of land in the neighbourhood of the holding; and by the Labourers Act, 1906, this is extended to the case of an agricultural labourer who acquires a plot under the Labourers Acts.

The power to make the regulation, however, depends on a

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determination, first, whether these occupiers constitute the class covered by the section; and, secondly, that such turf is necessary for their requirements; but, above all, the Land Commission must prescribe terms as to payment or otherwise as appear to them to be just, and they may make regulations, and the regulations may confer a right to enter on the land for the purpose of cutting and making turf. Anything which would prevent the future reclamation of the bog must be secured by the regulations, and also there must be careful provision that sufficient turf and pasturage are left for the use of the proprietor of the holding on which the bog is, and in addition to the terms as to payment and other terms that justice requires, provision may be made by which reasonable satisfaction is given for damage done by reason of entry, and the drastic restraint of fines not exceeding £5 may be imposed in order to make the regulations effective.

It has been insisted that to hold that regulations might be made by the Land Commission after the vesting order or fiat would amount to a restriction of the conveyancing force of the vesting order or fiat. This, to my mind, is a perfectly erroneous view of the section. It is quite consistent with the powerful effect of the vesting order, and it is precisely what one would expect to find where the powers given to the Land Commission and the occupiers of land in the neighbourhood are in the nature of compulsory purchase, or acquirement for a public purpose, and to meet public necessity, of something which otherwise could not be taken away from the purchasing tenant.

In the course of the first argument the late Lord Justice Moriarty pointed out that it bore a very striking analogy to the powers given to justices to make orders under the Grand Jury Acts to take road material. No one could suggest that a Landed Estates Court conveyance or a vesting order by the Land Commission could prevent the operation of this general overriding power, and the same remark applies with greater force in the present case, where it is not compensation for trespass alone that is given, but such payment as to the Land Commission may appear to be just for interference with the property of the purchasing tenant. No doubt these regulations in effect take away something that the conveyance had given, but only do this on fair terms to be determined by the statutory authority.

It was strenuously argued that the only regulations that were contemplated were to be made before vesting. In the case of labourers who are brought artificially within the provisions of the section, neither they nor their plots might come into existence until years after the vesting order had been made, so that in that case the regulations would certainly have to be made after the date of the vesting order; but where there is power given under a section of an Act of Parliament to make regulations, the Interpretation Act, 1889, sect. 32, incorporates a power from time to time to rescind, revoke, amend or vary such regulations, and there is nothing, I conceive, that could, as was argued strongly, justify an exclusion of this general statutory power from sect. 21. The section of the Interpretation Act needs only to be mentioned to show that regulations entirely revoking and varying could be made after the date of the vesting order, if there is power to make them at all; and it would be a ridiculous result that some kind of regulations should be made before vesting which might be entirely revoked and a new set made afterwards, unless there was power to make the first set of regulations after the date of fiat.

A reference to the Turbary Act of 1891, which was an earlier attempt to deal with the question of regulation of turbary, helps us greatly in the understanding and construction of this section.

By that Act it was provided, inter alia, that where a holding for the purchase of which an agreement had been entered into by a tenant comprised a bog subject to a right of turbary exercisable by persons other than the purchaser of the holding, the Land Commission might make regulations for the purpose of securing that the exercise of the right should not prevent the future reclamation of the bog, and that such persons should have reasonable facilities for the exercise of the right.

By sect. 5 power is expressly given to make these regulations whether the holdings were purchased before or after the commencement of the Turbary Act, except in one excepted case. It would be very strange if a more restricted construction was to be placed on sect. 21, which was intended to deal, as I conceive, in a wide and comprehensive manner with a case where the right of taking turbary before the sale was vested in the landlord.

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To restrict the power to make the regulations to a period anterior to the vesting order does not, on the construction which I put on the section, appear to be reasonable or in accordance with what I conceive to be the plain object of the section.

There only remains to be considered the effect of *King-Harman's Estate* (1).

King-Harman's Estate (1) was beyond doubt a case where the landlord had had rights reserved under sect. 5 of the Act of 1881.

The effect of the vesting order, whether it is made in a case where the Land Commission are selling under sect. 6 or where the landlord is selling under sect. 1, is precisely the same, and if the question was to be approached solely from the point of view of what the vesting order conveyed, the answer in the present case would undoubtedly be controlled by the judgment of the Court in *King-Harman's Estate* (1). On the other hand, if, as I conceive to be the law, sect. 21 in no way affects the operation in any case of the vesting order, but gives what amounts to statutory powers of compulsory acquisition of rights over certain tenants' lands on making compensation, then the ultimate decision in *King-Harman's Estate* (1) could not be supported; and, accordingly, again expressing my great hesitation in reversing a decision of such eminent judges, I feel compelled to do so, but I would repeat that the question was not argued in *King-Harman's Estate* (1), and if it had been argued, I feel perfectly sure that a different conclusion would have been arrived at.

The Court is unanimous in holding that the questions should be answered as follows:—

(1) Yes, subject to the provisions of the Irish Land Act, 1903.

(2) Subject to the provisions of the said Act, and to a power from time to time to rescind, revoke, amend, or vary the regulations, the Estates Commissioners may, in pursuance of such regulations duly made, grant a licence (exclusive or otherwise) to cut and make turf upon any particular portion of bog on the holding to any occupier of land in the neighbourhood for whose requirements

(1) [1908] 1 I. R. 202.

such turf appears to be necessary, for such time, and subject to such terms as to payment to the proprietor of the holding, and to such other terms, as may appear to them to be just.

Cherry L.C.J.:—

Two important questions of law on the construction of sect. 21 of the Irish Land Act, 1903, arise for our decision in this case:—(1) Can the Land Commission make regulations under that section, after the holding over which the right of turbary is to be exercised has been actually vested in the purchasing tenant thereof? and (2) Is the jurisdiction to make such regulations, which is conferred by the section, confined to cases where a right to cut turf upon the holding exists independently of the regulations? or does it enable the Land Commission to authorize the cutting of turf upon the holding by persons who prior to the regulations had no such rights?

These two questions, though apparently quite different, are really the same—or rather, I should say, the answer to the first depends upon that to the second. If the section is only intended to regulate existing rights, "as part of the terms of sale," in the words of Holmes L.J., in *King-Harman's Estate* (1), then it necessarily follows that this should be done before the sale is complete; i.e., before the holding is actually vested in fee-simple in the purchasing tenant. But if, on the other hand, the section is meant to confer upon the Land Commission a new and original jurisdiction to authorize compulsory powers of cutting turf on the holdings by persons who prior to the regulations had no such right, then there is no reason why the exercise of that power should be limited to the period prior to the completion of the sale.

Which of these views as to the construction of the section is correct? In *King-Harman's Estate* (1) this Court clearly decided in favour of the first view, namely, that the power to make regulations extended only to pre-existing rights and privileges. That appears from the judgments of all the members of the Court, but most clearly in the concluding passage of the judgment of Walker L.C. "It was next contended," he says (p. 208),

(1) [1908] 1 I. R. 202, at p. 212.

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"that sect. 21 of the Act of 1903 gave a new and original jurisdiction to the Estates Commissioners to authorize by rules and regulations the cutting of turf on the bog conveyed to Acheson. I do not think that is the effect of the section. I think it is pointed to a case where the right exists, or is saved, and provides for the mode of working it, so as to avert disputes and litigation. It is a useful supplement to sect. 34 of the Land Act, 1896, already referred to; but I do not think it gives a power to make regulations inconsistent with a Parliamentary grant already made."

If the decision in *King-Harman's Estate* (1) is now binding upon us, we are clearly bound to answer the two questions put to us in the negative; but the case of *King-Harman's Estate* (1) is not a very satisfactory one. There was no appearance for the Estates Commissioners, as there was before us, and the view so strenuously put forward by Mr. Jellett on their behalf in arguing this case was not even suggested in the arguments in *King-Harman's Estate* (1). Counsel for the adjoining tenants, in whose interests the proposed regulations were to be made, merely argued that they were in the enjoyment of a "privilege" which brought them within the terms of sect. 34 of the Act of 1896, and so preserved their rights. This was the real question argued and decided by the Court, and the narrow view of the construction of the section, namely, that it was confined to the regulation of existing rights, was assumed, rather than decided, by the Court.

The decision in *King-Harman's Estate* (1) is a clear authority in favour of the answers given by Wylie J. to the questions referred to him by the Estates Commissioners in the present case, and we are bound to hold that his decision was right, having regard to the authorities binding upon him; but, inasmuch as the full Court of Appeal has now been summoned for the express purpose of reconsidering the decision in *King-Harman's Estate* (1), it is our duty, notwithstanding the very high authority of the Court which decided that case, to give expression to our view of the construction of sect. 21, even though it may conflict with the views of the very eminent judges who formed the Court which decided *King-Harman's Estate* (1).

(1) [1908] 1 I. R. 202.

Reading the section by itself, apart from authority, I cannot see how it is limited in its application to persons who already possess some right or privilege of cutting turf on the holding. The Land Commission, it is expressly declared, may make regulations authorizing the cutting of turf on the holding "by any occupiers of land in the neighbourhood of the said holding for whose requirements such turf appears to be necessary." What force is given to the word "any," in this clause, by the decision in *King-Harman's Estate* (1)? The only limit imposed by the section itself is the requirements of the "occupiers of land in the neighbourhood." What right has the Court to impose another and a different limitation, namely, that the persons so designated must have previously possessed some right or privilege to take the turf? Perhaps it may be said that it would be a hardship on the purchasing tenant to compel him to allow turf to be taken off his holding by strangers; but the answer to this argument is twofold. In the first place, the right is conferred only where the purchasing tenant had not prior to the sale an exclusive right of turbary on the holding, and where, therefore, the landlord had the right to sell turf off it to any person he chose. Taking, therefore, the broadest view possible of the section, the purchasing tenant would be in no worse position under the Land Commission regulations than he would have been under his former landlord had there been no sale. In the second place, the section expressly provides that the regulations shall deal with the question of payment for such privilege in such manner as may appear to the Land Commission to be just. If the person upon whom a right to carry away turf from a holding is conferred did not previously possess any right or privilege to cut turf on the holding, it is only reasonable to suppose that the Land Commission would by these regulations provide for the payment of reasonable compensation to the purchaser of the holding, just as in any other case of the compulsory purchase of property by statutory authority.

Some remarks were made in the course of the argument as to the principle to be applied in fixing the amount of payments to be made in these cases, and the Lord Chancellor has referred to them in his judgment. For myself, I desire to guard myself, as he has

(1 [1908] 1 I. R. 202.

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done, from expressing any opinion upon the question of the amount to be paid for the exercise of the privilege, as the matter has not been raised by the Estates Commissioners in their queries, nor is it referred to by Wylie J. in his judgment. The matter may come before us judicially on some future occasion; and it is, in my opinion, our duty to preserve an open mind for its decision at that time.

The view I have endeavoured to express as to the construction of sect. 21 is strongly confirmed by the provisions of the Labourers Act, 1906, sect. 24 of which confers upon agricultural labourers the benefit of regulations under this section. This is done, apparently, whether the labourers had or had not, prior to the making of the regulations, any right or privilege to take turf from the holding.

For all these reasons, I am of opinion that the questions submitted to the Court should be answered in the terms stated by the Lord Chancellor in his judgment.

O'CONNOR M.R.:—

I am satisfied that the decision of this Court in *King-Harman's Estate* (1) was the result of raising a wrong issue, by which the real question for decision was obscured.

A reference to the second question which was put in that case shows that the view presented was that, notwithstanding the sale of the estate, there remained vested in the Land Commission, as vendors, some right of turbary which they could dispose of for payment. The question put was—"Can the Estates Commissioners in making regulations under sect. 21 direct that the payment referred to in that section shall be made to the Land Commission or their assigns?—a question which is only intelligible on the assumption that the Land Commission claimed some proprietorial interest in the turbary after sale.

When reading the report of the case I was at first unable to appreciate the fact that the Treasury was represented by counsel on the argument. His appearance is explained by the form of the question. The Treasury, no doubt, instructed counsel to support the view that the Land Commission, or the Treasury, had

(1) [1908] 1 I. R. 202.

a pecuniary interest in the turbary. This explains the reference by Lord Justice FitzGibbon, at the end of his judgment, to "the Treasury" as one of the possible payees for the enjoyment of turbary rights. It was this suggestion that the Land Commission or the Treasury had some interest in the turbary which diverted the attention of all parties from the real question. If, therefore, we now find ourselves bound to dissent from the judgments of such eminent judges as those who constituted the Court which decided *King-Harman's Estate* (1), we must feel relieved by the consideration that now, for the first time, the true view has been presented in argument.

I do not think that there can be any doubt that the Court of Appeal considered the question to be whether, after sale, some right remained in the vendor. At page 209 FitzGibbon L.J. says:—"The real question here is, whether a landlord who has sold the fee to a tenant under the Land Purchase Acts, without any express exception or reservation, retains any interest or power under which he can either himself enjoy, or can create in or assign to others the privilege of cutting turf on the lands sold"; and again, at page 210, he says:—"If we were to hold that a right of turbary survived to the landlord or to the Land Commission, after the vesting of holdings in tenants by instruments containing no reservation, or even indication of the existence of turbary rights, we should make confusion worse confounded." These words clearly indicate the argument of counsel, as he understood it, and I respectfully endorse his judgment, that an adoption of that argument would make confusion worse confounded.

It is also worthy of observation that the confusion pointed at by Lord Justice FitzGibbon in *King-Harman's Estate* (1) in one respect led astray the Court of first instance in the same case, because Mr. Justice Wylie, by answering the second question in the affirmative, adopted the view presented by the Treasury, that the payments for turbary should be made to the Land Commission. That view has, in the case we are now concerned with, been expressly disclaimed, and, I think, properly.

The argument now presented is, that the right to make

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regulations authorizing the cutting of turf on purchasers' holdings is quite independent of any right of property in the Land Commission, and is a purely statutable right, overriding the fee-simple estate of the tenant-purchaser, and the exercise of which may impose a burden on the tenant-purchaser's estate, which it was not previously subject to. This, I think, is the true view, and for the following reasons:—A sale to a tenant of his holding under the Land Purchase Acts, whether it be carried out by vesting order or by fiat, and whether it be a direct sale by the landlord or by the Land Commission, gives to the purchasing tenant the fee-simple of the lands, subject only to such easements as are preserved by sect. 34 of the Act of 1896, and to such reservations as are expressly made. Nothing that has not been expressly reserved remains in the vendor. He ceases to have any ownership in any part of the lands, including bogs. But, although the purchasing tenant has acquired the absolute fee-simple, he is subject to the statute law; and, if the statute law says that property generally, or that property acquired under the Land Purchase Acts, shall be subject to a certain liability, the owner, even though an owner in fee, must submit to the liability as an incident of ownership.

The question here is: Does the 21st section throw such a liability on certain holdings, even though they have become vested in the purchasers without any express reference to the liability? It is argued that the existence of any such liability is inconsistent with the estate conveyed by the vesting order or fiat. I do not think it is, because the liability is a statutory incident of ownership, just as the liability to tithes was an incident of the ownership of every fee-simple estate even though conveyed by a Landed Estates Court conveyance. On the language of the 21st section I am of opinion that the power thereby vested in the Land Commission is exercisable after the sale has been completed. The words, "and the purchaser had not an exclusive right of turbary before such sale," point to a sale which has gone through. The purchaser over whose lands the power is to be exercised is described in the 2nd sub-section as "the proprietor of the holding"—a description which is an apt one for a person who has already acquired the fee-simple, and it is in this sense that the same

description is used in the 54th section. The regulations "authorizing the cutting or making of turf" must also, as the language clearly indicates, be regulations giving *authority*, and not merely regulations regulating the exercise of an authority previously existing. In other words, a new authority, previously non-existing and carrying a new right, is to be given. A new liability is to be imposed by the exercise of the power to make regulations, and, as compensation for this liability, a payment to the purchaser of the holding may be ordered. It is clear that it is to the purchaser this payment is to be made, and not to the Land Commission, as was put forward in *King-Harman's Estate* (1). This removes all argument based on a grievance suffered by a purchaser. Something is, no doubt, taken away from him, but he receives compensation, and he is in no worse position than any other owner of property who has to submit to the exercise of compulsory powers for the benefit of the community.

For these reasons I am of opinion that the tenant-purchaser, Hennessey, not having had an exclusive right of turbary before the sale, is subject to the jurisdiction conferred on the Land Commission by the 21st section of the Act of 1903, and that the Land Commission may authorize the cutting or making of turf on his holding by any occupiers of land in the neighbourhood of such holding for whose requirements such turf appears to be necessary upon such terms as to payment or otherwise as may appear to them to be just. I am further of opinion that the persons entitled to receive such payment or to the benefit of any other terms imposed by the Land Commission are the purchaser and his assigns.

RONAN L.J.:—

The object of the Purchase Acts was the creation of tenant proprietors, and loans and public money were made available for this purpose. The *ultimate* object was to vest in the existing tenant a certain estate in the lands, which I will refer to as the proprietor's estate. This was to be carried out either by a simple sale to the tenant by the landlord, or by the double process—first, of a sale by the landlord of his estate to the Land Commission or

(1) [1908] 1 I. R. 202.

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Congested Districts Board, and then sales by them *as landlords* to the tenants. (I leave the Congested Districts Board out of the case, and also sales by the Land Judge. Special provisions are made for these cases, and I see nothing in them inconsistent with the views hereinafter expressed.) Whether the proprietor's estate was the result of the single or double process, the proprietor's estate in the end was intended to be the same.

The Land Commission had a discretion as to advancing public money, limited in the case of certain tenants in cases under the Act of 1903 (zone cases), and also a discretion as to declaring an estate to be an estate fit for the purposes of the Acts.

These matters, in my opinion, may be entirely ignored in the present case. Here the estate has been vested, and the real questions to be decided are—(1) What is the proprietor's estate in this case? and (2) what powers in respect of turbary the Land Commission can exercise over it? As to the first question, it is one of great general importance, and as considerable doubt has existed in reference to it, I have to treat it at considerable length. It is, shortly, whether the proprietor's estate is limited to what constituted the subject of his former tenancy. The result of holding that it is would be that if the terms of the vesting order went beyond this, so far it would be inoperative, and therefore that the vesting order can never be relied on until you have ascertained the terms of the former tenancy. The Act of 1903 only deals with a limited class of cases. These, so far as this case is concerned, are—(1) Sales of estates to the Land Commission (or Congested Districts Board) with a view to a resale thereof by them to tenants; (2) sales by landlords to tenants forming part of a sale of the entire estate to the tenants thereof. Both of these are referred to in sub-s. 1 of the Act. The contracts of sale by the landlords in these cases always contain the clause: "In case an estate of which the said holding forms part shall be sold under the Irish Land Act, 1903."

The Act of 1903 makes special provisions applicable only to sales under that Act, and it will be observed that sect. 21 begins, "In the case of the sale of an estate." This case, therefore, must proceed on the basis that there has been a valid sale to the tenant under the Act of 1903. The only possible purchasers of land

under the Act of 1903 were (1) the Land Commission, (2) the Congested Districts Board, and (3) the tenants and other persons mentioned in sect. 2 (for which sect. 17 of the Act of 1909 has been substituted). In this case we are only concerned with the Land Commission and the tenant. In all cases the scheme of the Acts is that the purchaser shall have a statutory title discharged from all claims, not specially excepted. The claims must be: (1) of the tenants; (2) those of persons having claims on the tenants' interests; (3) the easements, &c., under sect. 34 of the Act of 1896; (4) the claims of all persons on the estate in the land subject to the tenant's interest.

In the Acts previous to 1903 the creation of the proprietor's estate was carried out by vesting orders (or "fiats" having the same effect). A conclusive legal operation was given to these by stating that they should operate as a Landed Estates Court conveyance. This refers to sect. 61 of the Landed Estates Court Act. This section destroys all existing rights and claims as against the lands, but does not transfer them to the purchase-money. This is practically done by sect. 64, which provides for the application of the purchase-money. This section is applied to sales under the Land Purchase Acts by sect. 10 of the Act of 1885. Sect. 9 of that Act expressly provides that the claims shall be transferred to the purchase-money, and the purchaser discharged therefrom. Sect. 14 of the Act of 1887 contains a provision which enables the Land Commission, if they think fit, to make an order having this effect. This order can apparently be made quite apart from and prior to the vesting order. This order I shall call a "transfer order."

So far we have no definite intimation of what this vesting order *may* or *must* contain, i.e. any definition of what the proprietor's estate must be. Sect. 31 (sub-s. 1) of the Act of 1896 is vital on this: "Where any *land* has been sold under the Land Purchase Acts . . . in every such case the *land* shall be vested accordingly in the purchaser *in fee simple*." Sect. 31 (sub-s. 2): "A vesting order shall be subject to such exceptions and reservations as are specified in the order if they were contained in the agreement for purchase, or subsequently agreed to by the vendor and purchaser." Mr. Jellett treated this sub-section as if it

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limited the operation of the vesting order to what is comprised in the agreement. This is not so. The sub-section in no way diminishes the fee-simple which the vesting order purports to give the tenant. It only operates to prevent the operation of the vesting order so far as it purports to create exceptions or reservations out of that fee-simple. Its operation may increase the tenant's estate by removing such exceptions or reservations. It cannot diminish the estate given to the tenant by the vesting order.

This was the position prior to the Act of 1903. Though some of the sections (e.g. sect. 31 above quoted) use general terms, such as "sold under the Land Purchase Acts," I think it clear that the whole of this code as to vesting and the statutory effect of vesting orders only applied to sales to tenants, and that no part of it applied to sales to the Land Commission. Their powers of purchase are contained in sect. 47 of the Act of 1870, sect. 34 of the Act of 1881, and sect. 5 of the Act of 1885. It is plain that sect. 8 and sect. 9, sub-s. 5, of the Act of 1885 have no application to such a case. The result is that in a case prior to the Act of 1903, when the Land Commission purchased, the transaction was regulated by the ordinary law of vendor and purchaser; but when they came to sell to the tenants, the Acts of 1885, 1887, and 1896 applied.

The Act of 1903 gives a new power to purchase to the Land Commission by sect. 6. By sect. 6, sub-s. 1, in estimating the price, they are to have regard "to the prices which the tenants and other persons are willing to give for the holdings and other parcels of land comprised in the estate." Sect. 6, sub-s. 2, provides practically that if they can obtain undertakings by tenants to purchase which will enable them by resale to realize the estimated price they may buy at that price. Sect. 6, sub-s. 3, provides that under special circumstances the Lord Lieutenant may dispense with the condition as to undertakings if the Land Commission certify to them that "the resale of the estate can be effected without prospect of loss." Now, it is obvious from this section that the whole estate in the lands purchased is to be resold to the tenants and other persons referred to.

The Act of 1903 makes an entire change in the mode in

which an estate purchased by the Land Commission is vested in them. It also strictly defines the estate and the only estate which they can so acquire. By sect. 16, the Land Commission are empowered to "make a vesting order which shall be effectual to vest in the Commission the fee-simple of the land purchased," subject as in the section mentioned . . . "but, save as aforesaid . . . discharged from the claims of all persons who are interested in the land, whether in respect of superior or intervening interests, or incumbrances or otherwise, and all such claims shall, as from the date of the vesting order, cease as against the land and attach to the purchase-money in like manner as immediately before the date of the order they attached to the land."

Now, this section is complete in itself. It does not incorporate or refer to the Landed Estates Court Act. It does not even make the operation of the vesting order depend on its terms, save perhaps as to sporting rights and minerals. It is the only vesting order they have power to make. It operates both as a vesting order and as a transfer order, and its entire operation is fixed by the section itself. It is obvious that the vesting portion, the discharge portion, and the transfer portion must be consistent. Now, what is the fee-simple in the land subject to—(*a*) "Any public rights affecting the land"; (*b*) "any sporting rights reserved by the vendor"; (*c*) "any maintenance charge under the Public Works Acts"; (*d* 1) "any interests of the tenants on the land, or of persons having claims upon those interests"; (*d* 2) "any easements . . . mentioned in sect. 34 of the Act of 1896"; (*e*) "subject to the provisions of this Act with respect to minerals"? Of these (*a*), (*c*), (*d* 1), (*d* 2) are fixed, and (*b*) requires explanation. By sect. 13, sub-s. 1, "Where at the time of sale of any land to the Land Commission or to tenants or others, the vendor has . . . sporting rights, exclusive of the tenant, those rights may by agreement between the vendor and purchaser be either conveyed to the purchaser or be expressly reserved to the vendor, and in the absence of such agreement those rights shall be vested in the Land Commission." Therefore, if the sporting rights are by agreement reserved to the vendor, this should be mentioned in the vesting order. As to (*e*), sect. 13, sub-s. 3, provides that "on the sale of any land by the Land Commission or of any land comprised

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in an estate by the owner of the estate, there shall be reserved, in the prescribed manner, to the Commission the exclusive right of mining and taking minerals." Rule 26 provides that this is to be done "by express declaration in the fiated agreement or words inserted in the vesting order or otherwise as the Commissioners may direct."

It is remarkable that it appears from the above that in cases of purchase by the Land Commission the only terms of the sale that the parties have any voice in are (1) the price and (2) the sporting rights exclusive of the tenants. The Commission must get the land in fee-simple subject only to (*a*), (*c*), (*d* 1), (*d* 2), and (*e*). The sporting rights may remain outstanding in the vendor. It must be remembered, however, that sect. 99 entirely excludes from the operation of the Act the interests therein mentioned, so that these are not affected by the vesting order, and remain outstanding.

As the Commission can only purchase under the Act for the purpose of sale to tenants (sect. 6), it is plain that the sole object of so vesting this estate in fee-simple in them is to enable them to sell it to the tenants.

The provisions of sect. 13, sub-sects. 1 and 3, above referred to, apply also to sales under the Act by the Land Commission, or by a landlord, to tenants. It follows, therefore, that the only interests in the land contemplated as remaining in the Land Commission after the sale by them to the tenants are the sporting rights and mining and mineral rights dealt with by sect. 13 (see sect. 13, sub-s. 3, final paragraph, and sub-sects. 4 and 5).

When the Commission sells to tenants the lands which have so become vested in them, what estate is to be vested in the tenants as the result of the transaction? The difficulty arises (1) from the fact that the Act of 1903 does not provide any vesting order in the case of sales to tenants; (2) from the frequent use of the term "purchaser of his holding," and "vesting of the holding" in the Acts, and the definition of "holding" and "parcel of land" in the Act of 1881.

I now take the case of the purchase of an estate of 50,000 acres, situated thus:—A, being entitled in fee to the lands, by deeds in a common form, demises the entire lands for twenty-one

years to various tenants at the rent of £1 per acre, reserving and excepting—(S), the exclusive sporting rights; (M), the exclusive mining rights; (G), the right of grazing one beast for every twenty acres; (T), the exclusive right of turbary. All the tenants undertake to purchase "their holdings," and the Land Commission agree with *A* for the sale of the estate to them under the Act of 1903 for a price agreed on, (S) being reserved to *A*. The vesting order under sect. 16 is then made. It is plain, first, that *A* retains nothing but (S) (and, of course, the subjects of section 99, which may be left out of consideration). Next, the Land Commission take subject to the tenant's interests, but these interests do not include (T), and are subject to (G). Therefore, the Land Commission clearly take (T) and (G) under their vesting order. (G) is a very valuable right, the right of grazing. (T) and (G) are vested in the Land Commission, and *A*'s claims thereto are attached to the purchase-money by the final clause of section 16, sub-s. 1 (d).

The Land Commission then proceed to carry out the "re-sale of their estate" mentioned in sect. 6 by selling the lands to the tenants. The practical question is what is to be done with the two valuable properties (T) and (G), which the Land Commission have bought and paid for. They are not part of the interest of the tenants. The tenants only had leases subject to (G) and (T). It was the land minus (G) and (T) that they held from the landlord and paid rent for. They did not form part of the holdings in the strict sense of the word. Neither did (S) and (M), but these are expressly provided for by sect. 13 in the event of their being retained by the Land Commission. There is no such provision for (G) or (T) (unless, as was once suggested, sect. 21 is such a provision in case of (T)). What is to become of (G) in the hands of the Land Commission if it is not vested in the tenants? What are they to do with their right to this grazing over an estate of 50,000 acres in the hands of peasant proprietors? Are the Land Commission to make a separate sale of this *profit à prendre* in gross? It is obvious that the Act contemplates nothing of the kind. I think, therefore, that the Act requires that it should be so construed as to enable the Land Commission to re-sell, and to oblige them to re-sell, to the tenants the entire interest in the

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land which they had acquired under their vesting order, except so far as is otherwise provided by sect. 13.

I now proceed to show how the Act of 1903 really requires this to be done. I have pointed out that the vesting order under sect. 16 operates (1) as a vesting order proper; (2) as a discharge from claims; (3) as a transfer of claims to purchase-money; and that it is essential that (1), (2), and (3) should be consistent. I have also called attention to the power under the former Acts to make a transfer order if the Commission think fit, either before or after the vesting order, and that the effect of that order if made was both (2) and (3): Act of 1887, sect. 14, sub-s. 1. Now, sect. 24, sub-s. 1, of the Act of 1903 is as follows:—"In the case of the sale of an estate to persons other than the Land Commission, so soon as the holding or parcel of land comprised in the estate is vested in the purchaser, the Land Commission shall, in pursuance of sub-sect. 1 of sect. 14 of the Act of 1887, pay the purchase-money into the Bank of Ireland, and make an order attaching claims to the purchase-money, which shall be as effectual for that purpose as a vesting order made by the Land Commission vesting land in them." That is, the order under sect. 16. Applying this to the re-sale to the tenants of the estate of *A* already described, the vesting order operates as a transfer order under sect. 16 attaching the claims of *A* in respect of (G) and (T) to the purchase-money; but the order under sect. 24, sub-sect. 1, in this respect is to have the same effect as a vesting order under sect. 16. Therefore, it must have the same effect in respect of (G) and (T) in the case of the re-sale to the tenants. Therefore, they cannot retain (G) and (T), therefore (G) and (T) must be vested in the tenant. The result is that in the case of a re-sale to the tenant, the vesting order must operate so as to produce the same result as one under sect. 16. In a case of re-sale the words in sect. 16 (1) (*d*), "subject to any interests of the tenants on the land," would, of course, be inoperative, as the vesting order vested the property in the tenant himself. This is really the first proposition contended for by Mr. Kennedy in his able argument.

Is any machinery provided to enable this to be done? It must be found in the earlier Acts. Sect. 8 of the Act of 1885

authorizes an order vesting the holding, or the interest of any person or of the Land Commission in the holding, in the purchaser. This seems sufficient, but it may possibly be thought to raise the "holding" difficulty. However, sect. 31, sub-s. 1, of the Act of 1896 drops the word "holding" altogether. It says, "Where any land has been sold under the Land Purchase Acts . . . the sale of such land . . . shall be made discharged from all superior interests, and in every such case the land shall be vested accordingly in the purchaser in fee-simple, and such superior interests, or the value thereof, shall be a lien upon, and be redeemed or satisfied out of, the purchase-money of the land." Sect. 31, sub-s. 2—"A vesting order shall be subject to such exceptions and reservations as are specified in the order, if they were contained in the agreement for purchase, or subsequently agreed to by the vendor and purchaser." As all the Land Purchase Acts are to be read together, I see no reason why the vesting order contemplated by sect. 13, and required by the joint effect of sect. 24. sub-s. 1, and sect. 16 of the Act of 1903, should not be made under these sub-sections. As to s. 31, sub-s. 2, again, if my view of the Act of 1903 is correct, the clause in the agreement (Form F (5)), "the said holding shall be vested in the tenant in fee-simple, subject as hereinafter mentioned, and as provided by the Irish Land Act, 1903," is sufficient to meet this. Indeed, this clause and the following clause (Form F (6)) would almost seem to be framed for the purpose of authorizing a vesting order in the terms of sect. 16 of the Act of 1903.

Up to this I have dealt exclusively with a case like the *King-Harman Case* (1), where the sale to the tenant was a re-sale of an estate purchased under sect. 6 of the Act of 1903. Mr. Jellett attempted to distinguish between what he called sales to tenants under sect. 6 and sales to tenants under sect. 1. Sect. 6 contemplates *re-sale* to tenants, but it gives no power whatever to make such sales, and it contains absolutely no provision applicable thereto. It recognizes the power to re-sell; but that power arises solely from the fact that, by their purchase of the estate subject to the interests of the tenants, the Land Commission become the landlords, and can sell as such. So far from there being any

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such distinction, the *re-sales* contemplated by sect. 6 *are* sales within sect. 1. The very words at the head of the section—"Purchase and Re-sale"—show this. The section only deals with the purchase-money of *a holding*, and it is obvious that the word "re-sale" is introduced for the purpose of putting this beyond doubt. The provisions in the Act of 1903, applicable to re-sales to tenants—*e.g.*, sect. 13 and the all-important sect. 24, sub-s. 1—apply equally to all sales to tenants, whether by the Land Commission or anyone else. There is no provision applicable to re-sales alone. It follows, therefore, that if the conclusions above stated are correct in the case of re-sale by the Land Commission, they apply to all sales to tenants under the Act of 1903.

This is practically the view taken by the Court in the *King-Harman Case* (1), and is what is meant by Fitzgibbon L.J., when he speaks of "an instrument purporting to give him everything which the vendor had." This is, of course, a general expression; but it is no harm to point out—(1) that, in my view, it does not, and cannot, give him the mining rights or the matters mentioned in sect. 99, and it may not give him the sporting rights. In the next place, as to "what the vendor had." The vendor may have been an impostor, who, by means of forgeries and false affidavits, brought himself within sect. 17. The more correct expression would have been, "everything which the tenant had not."

As the practice of the Land Commission is to carry out sales by fiat, and not by formal vesting orders, it is obvious that the tenants' undertakings or agreements must be carefully framed, so that the fiat will operate so as to carry out sect. 16 of the Act of 1903. This has been carefully carried out by the prescribed forms. Otherwise the tenant would not get what is defined in sect. 16. That is what his contract, by its terms, entitles him to, and that is what the fiat gives him. There can be no doubt that, in the case I have put, this includes the grazing right and turbary, formerly reserved by the landlord. He does purchase these. They are as much part of the consideration for which he agrees to pay the purchase-money as the land itself. There is nothing in the nature of a bonus to the tenant.

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In estimating the price a man is willing to pay for something, what he considers is, in ordinary cases, "What am I to get for my money?" Here what he is asked to buy is—(1) his former holding; (2) the valuable grazing and turbary rights of the landlord. He is to offer a lump sum for (1) and (2). I suppose it must be density on my part, but I confess I cannot even understand the suggestion that in considering the price he gave for (1) and (2) he ignored (2), and that he put no value on it, and that he would have given the same price for the land without getting these valuable properties with it as he gave for the land with them. I think that any suggestion of the kind is contrary to law and fact, and that it is not open to any tribunal dealing with these rights so purchased and paid for by the tenant to consider that he attached no value to them when estimating the price he agreed to pay under his contract which included them. This matter in no way arises in the case before us; but as the Lord Chancellor has thought it necessary to deal with it—and his opinion will naturally have almost conclusive weight with inferior tribunals—I have thought it my duty to express my respectful, but absolute, dissent from his view on this matter. It is to my mind a very grave matter, for if the Lord Chancellor's views were correct, it would be open to the Land Commission, when considering "what terms appear to them to be just," to say: "He never had this right; he never paid one penny for it; why should he be paid for letting the people do what they were always allowed to do by the landlord?" In my opinion, this would be contrary to law.

As to sect. 21, the Lord Chief Justice suggested during the argument that treating it as simply a power of compulsory purchase got rid of all difficulty. On the former argument Moriarty L.J. suggested it was an enactment similar to sect. 162 of the Grand Jury Act of 1836. I entirely accept this view. Once the effect of the vesting order is admitted, sect. 21 can only take effect as a power of compulsory purchase. The section of the Grand Jury Act in relation to gravel is strictly analogous.

It was argued that the limitation of this section to cases where the tenant had not previously this exclusive right showed that he did not get it under his vesting order, but that it remained in, or

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was granted to, the Land Commission, as mining rights *must* be and sporting rights *may* be under sect. 13. In my opinion this is not so. The limitation is easily explained on the ground that it would deter tenants from purchasing if they thought that any of their *existing rights* would be thereby in any way diminished. There is no intermediate view. The turbary rights either passed or did not pass to the tenant. If they did, they were the tenant's absolute property as much as anything else that passed, and remained so unless and until the Commission exercised the power given by the section. In my opinion, the power was simply a power of compulsory purchase. Thus only can full effect be given to the vesting order; and I agree with the opinion of the Court in *King-Harman's Case* (1), that it is essential that no doubt should be cast on the effective operation of a vesting order or fiat. I go further. I am of opinion that the vesting order would not carry out the contract of the parties if it had not this full operation.

As to the construction of sect. 21: (1) there is nothing unjust or unusual in a power of compulsory purchase of property; (2) even if there were, in this case I think the injustice is really the same when the power is exercisable after the property is bought and before the formal conveyance as when it is exercisable after the formal conveyance; (3) do the words, "In the case of the sale of an estate . . . and the purchaser had not an exclusive right of turbary before such sale," show that it was not intended to extend to the period when the purchaser became the proprietor?

I think not. In the first place, the Master of the Rolls has pointed out that the word "proprietor" occurs in sect. 21 (sub-s. 2). In the next place, the section is really an extension of the powers of sect. 4 of the Turbary Act, 1891. The words "agreement" and "purchaser" are used in that section, and the word "proprietor" is not. Still sect. 5 (last clause) clearly shows that the power can be exercised after the purchaser has become the proprietor. The form of application (at p. 916 of Cherry) under this Act shows how clearly this view was held.

In the *King-Harman Case* (1) the Court thought the exercise of the power inconsistent with the vesting order, but, curiously enough, not with the rights of the purchaser under the contract.

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Giving full effect to the vesting order as I have done, and treating sect. 21 as a simple power of compulsory purchase such as I have described, seems to me not only a clear mode, but the only mode, of giving any real working effect to sect. 21.

As this Court is reconsidering the *King-Harman Case* (1), I think it right to say, with the most profound respect for the great judges in that case, that the distinction it establishes between what can be done before and after the date of the vesting order does not appear to me consistent with legal principle. The transaction is a contract of sale. The vesting order takes the place of the formal conveyance; the formal conveyance ought to give to the purchaser what he contracted to buy. Under sect. 31, sub-s. 2, of the Act of 1896, it would appear to me that if the turbary rights were not excepted in the contract, even an express exception in the vesting order would be inoperative. No such question arose in the *King-Harman Case* (1) or in this case, but this subsection shows how careful the Legislature was to protect the purchaser's rights under the contract. In the *King-Harman Case* (1) the transaction was carried out by a fiat, without special terms as to turbary. The formal conveyance, therefore, strictly followed the contract. I cannot believe that it was ever intended that there should be a power to the vendor to interfere with the purchaser's rights under the contract during the interval between the contract and the conveyance, but that this power should cease on the execution of the conveyance, which only carried out the contract. Treating sect. 21 as conferring a power of compulsory purchase disposes of this difficulty.

MOLONY L.J.:—

Under sect. 5, sub-s. 5, of the Land Law (Ireland) Act, 1881, the landlord of a statutory tenancy, or any person authorized by him, had the right to enter upon the holding for the purpose of cutting turf, save such turf as might be required for the use of the holding. In most cases of statutory tenancies this right was exercised under the authority of a "bog ticket" given by the landlord to some person. When the tenant purchased his holding under the provisions of the Purchase of Land (Ireland) Act, 1885,

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the vesting order was declared by sect. 8 of that Act to be as effectual as if it were a conveyance or assignment executed by one of the Land Judges of the Chancery Division of the High Court of Justice in Ireland under the Landed Estates Court Act. This section, however, contains a proviso that where the purchaser of a holding is also tenant of the holding, the interest vested in him by such order shall, subject to any charges, rights, or easements set out in the order, be deemed to be a graft upon the previous interest of the tenant in the holding, and be subject to any rights or equities arising from its being such graft.

In order to obviate the necessity of setting out in the vesting order particular easements, sect. 34, sub-s. 1, of the Land Law (Ireland) Act, 1896, provided that a holding vested in a purchaser by a vesting order under the Act shall continue to have appurtenant thereto, and to be subject to, as the case may be, any previously existing easements, rights, and appurtenances; and any privilege previously in fact enjoyed, whether by permission of the landlord or otherwise, in such manner, and for such time, that, if the holding had belonged to a different owner from the rest of the estate, it would have been an easement or right, shall be an easement or right within the meaning of this section, and shall be appurtenant to or exercisable over the holding, as the case may be.

Section 32, sub-s. 1, of the Land Law (Ireland) Act, 1896, provides that the Land Commission shall fiat an agreement for the purchase of a holding subject to such conditions, exceptions, and modifications as they may think necessary, and, on the advance being paid, such fiat shall have effect as if it were a vesting order made by the Land Commission in relation to the holding purchased, and the provisions of the Acts relating to vesting orders shall apply and be construed accordingly.

The tenant in the present case purchased under the provisions of the Act of 1903. He had had a fair rent fixed, and the case was within the zones, and the purchase was accordingly carried out under the provisions of sect. 1 of the Irish Land Act of 1903. The agreement, which was duly fiated by the Land Commission, was in the usual form F, and by that it was agreed that the said holding shall be vested in the tenant in fee-simple, subject as

thereinafter mentioned "and as provided by the Irish Land Act, 1903."

Section 21, sub-s. 1, of the Act of 1903 provides that in the case of the sale of an estate where portion of the holding consists of bog, and the purchaser had not an exclusive right of turbary before such sale, the Land Commission may make regulations authorizing the cutting or making of turf on that bog by any occupiers of land in the neighbourhood of the said holding for whose requirements such turf appears to be necessary, upon such terms, as to payment or otherwise, as may appear to them to be just, and those regulations may confer a right to enter upon any land for the purposes aforesaid.

It is admitted here that the tenant purchaser had not an exclusive right of turbary before the sale, but the tenant having got his vesting order contends that any regulations which could be made under this section must be made before the vesting order and not after, and that there is now no power to make regulations as regards the turbary upon his holding. This contention is in accordance with the decision in *King-Harman's Estate* (1), but, after fully considering that case, I am of opinion that it was wrongly decided. It would have been easy for the Legislature to have said that the regulations should be made before the vesting, but there is no limitation of time imposed by the section, and it must be construed in the light of the Interpretation Act of 1889. Sect. 32, sub-s. 1, of that Act provides that where an Act passed after the commencement of that Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires; and sect. 32, sub-s. 3, further provides that, where an Act confers a power to make regulations the power shall, unless the contrary intention appears, be construed as including a power to rescind, remake, amend, or vary the said regulations. This power to rescind regulations and make others "as occasion requires" is quite inconsistent with the contention of the tenant-purchaser that they must be made before vesting or not at all.

Section 4 of the Turbary (Ireland) Act, 1891, provides that

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where a holding for the purchase of which an agreement has been entered into by a tenant comprises a bog which is subject to a right of turbary exercisable by persons other than the purchaser of the holding, the Land Commission may make regulations for the purpose of securing that the exercise of the right shall not prevent the future reclamation of the bog. Sect. 5 provides that the Act shall apply where holdings have been purchased either before or after the commencement of the Act under any of the Land Purchase Acts, but that where a holding subject to a right of turbary has been purchased before the commencement of the Act, the regulations under the section shall be made only on the application of the proprietor of the holding. The section is important as showing that in the view of the Legislature regulations could be made to affect holdings purchased before the commencement of the Act, and, unless otherwise provided, without the consent of the proprietor of the holding.

Section 24 of the Labourers Act of 1906 provides that an agricultural labourer who was tenant to a district council of a cottage and plot, or of an allotment under the Labourers Acts, in the neighbourhood of such holding as is referred to in sect. 21 of the Land Act of 1903, shall be deemed for the purpose of turbary to be an occupier of land in that neighbourhood. This section would be meaningless if it was not within the power of the Land Commission to make regulations from time to time providing for turbary, as of course occupants of labourers' cottages change from time to time, and it would be absurd to suppose that the Legislature meant to give the occupant of a cottage the right before vesting, and that when his occupancy ceased the Land Commission had no power to give a similar right to the subsequent occupants of the same cottage.

I am, therefore, of opinion that the regulations can be made by the Land Commission at any time.

Some discussion took place in the course of the argument as regards the terms which might be considered just. It is to be remembered that the effect of the purchase is to pass to the purchaser a statutory fee-simple, but this fee-simple is, under the terms of the fiated agreement, expressly subject to the terms of the Act, and one of these terms is the power of the Land

Commission to make regulations under sect. 21 of the Act of 1903. The tenant-purchaser in this case bought expressly subject to the right of the Irish Land Commission to make regulations. The Act leaves it in the discretion of the Land Commission to impose "such terms as to payment or otherwise as may appear to them to be just," and there is no suggestion as to the principle upon which the amount to be paid is to be ascertained.

Two different views have been suggested, one being that the proper amount would be the value of the turf as a commercial commodity, and the other that the Legislature did not mean to limit the discretion of the Land Commission in any way, but to leave them to arrive at a just conclusion in view of the circumstances of each particular estate. I think there is a great deal of force in the observations of the Lord Chancellor on this branch of the case, but as the point has not been fully argued, and does not arise at the present time, I agree with the Lord Chancellor that it is not desirable either to form or express any definite view upon it.

I concur in the answers which the Lord Chancellor has read to the two questions submitted for our consideration.

Solicitor for the Estates Commissioners: *W. Alexander.*
Solicitors for Patrick Hennessey: *Kieran & Hickman.*
Solicitors for Bridget Kelly and John Murphy:
Thomas Kelly & Co.
Solicitor for the Vendor: *H. D. Vaughan.*

R. ST. J. C.

Wylie J.
1916.
May 25.

In the MATTER of the ESTATE of MABEL RYND and ANOTHER.

Land Purchase Acts—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 16, *sub-s.* 1; *s.* 24, *sub-s.* 1—*Order attaching Claims to Purchase-money—Superior Interest—Fee-simple Head Rent—Conversion.*

Where on the sale of an estate under the Land Purchase Acts the lands are vested in the tenant purchasers, and the purchase-money is paid into the Bank of Ireland and an order made attaching claims thereto, pursuant to the provisions of sect. 24, sub-s. 1, of the Irish Land Act, 1903, the claim in respect of a fee-simple head rent theretofore payable out of the lands is thereupon converted into a personal claim.

Frewen v. *Frewen* (L. R. 10 Ch. 610) applied.

QUESTION of law arising on the rulings on title to the redemption price of a head rent redeemed out of the purchase-moneys of the lands sold in this matter.

At the date of his will hereinafter stated, the Rev. A. W. Streane was entitled in fee-simple to a head rent of £56 10*s.* 1*d.* payable out of the lands of Lowpark, county Westmeath. By his will, dated the 23rd August, 1900, he devised to his wife, Muriel K. Streane, for her life, the rents and profits of all real estate of whatsoever kind of which he should die possessed, and appointed Barry Meade sole executor of his will. By a codicil to his will he devised all the real estate of which he should die possessed to Barry Meade absolutely, subject to the life interest therein of his wife.

On the 20th December, 1906, the owners of the said lands of Lowpark entered into agreements for the sale thereof to the occupying tenants under the Land Purchase Acts. On the 9th November, 1914, the Rev. A. W. Streane entered an appearance in the Land Commission matter. On the 25th March, 1915, the lands were vested in the tenants by the Land Commission, and on the same date the purchase-money was paid into the Bank of Ireland and an order was made attaching claims thereto.

The Rev. A. W. Streane died on the 10th September, 1915,

and probate of his will was duly granted to Barry Meade. On the 1st December, 1915, a consent was entered into between Mrs. Muriel K. Streane, Barry Meade, and the vendors, to redeem the said rent of £56 10*s.* 1*d.* at the sum of £1,327 17*s.* In the consent it was claimed that Mrs. Muriel K. Streane was entitled as tenant for life, and that Barry Meade was entitled in remainder, or in the alternative that Barry Meade was entitled as personal representative of the Rev. A. W. Streane, deceased. The consent was duly made a rule of Court, and the redemption price placed to the separate credit of this item. By the rulings on title the redemption price was vouched as payable to Barry Meade, as executor of the Rev. A. W. Streane, deceased, if the judge should be of opinion that it should be treated as forming part of the personal estate of the said deceased, or to the trustees of the settlement created by the will and codicil of the said deceased, when appointed for the purposes of the Settled Land Acts, if the judge should be of opinion that it formed portion of the real estate of the said deceased.

Ernest Leet, for Barry Meade claiming to be entitled in remainder to the real estate of the testator:—

This rent was not converted at the time of the testator's death. The theory of conversion is based on contract. There is no privity between the owner of a superior interest and the contracts entered into between the vendor and his tenants. In *In re Croker's Estate* (1) (at p. 529) your Lordship said:—"It seems to me, therefore, that sect. 14 of the Act of 1887, and sects. 16 and 24 of the Act of 1903, can be construed so as to work in perfect harmony with the existing law as to conversion by contract as between the real and personal representatives of a deceased vendor, and that to give sect. 16 a more extended construction would be in contravention of the principle applied by the House of Lords in *De Vesci* v. *O'Connell* (2)." It is submitted that this rent was not converted until redemption. Under the Lands Clauses Acts, a mere notice to treat is not sufficient to effect conversion: *Haynes* v. *Haynes* (3); *Re Battersea Park Acts* (4). But a notice to treat followed by an agreement as to price does effect conversion. The compulsion

(1) [1913] 1 I. R. 522.
(2) [1908] A. C. 298.
(3) 1 Dr. & Sm. 426.
(4) 32 Beav. 591.

Wylie J. 1916. *In re* RYND'S ESTATE.

exercised against the owner of a superior interest under sect. 16 of the Act of 1903 is analogous to that under the Lands Clauses Acts. In *Colles* v. *Hornsby* (1), Palles C.B. says (at p. 239) :— "Mr. Justice Gibson is of opinion that difficulty arises as to the descendible character of the 'superior interest' between the vesting order and redemption, and uses this as an argument against my view. I cannot see any such difficulty. In my opinion, it descends as realty until redemption."

T. G. Marnan, for Barry Meade as personal representative of the testator :—

In the cases referred to under the Lands Clauses Acts the question was—Was there a contract that could be enforced? There could not be an enforceable contract until the price was fixed. That is not the question here. Once the order attaching claims has been made, the only right which an owner of a superior interest has is to be compensated for his claim out of purchase-money. That is a right which passes to his personal representative. *Frewen* v. *Frewen* (2) applies to the facts here. It was a case where there was a devise of advowsons which was held to have been adeemed by the Act which abolished advowsons and gave compensation to the owner.

WYLIE J. :—

I have no doubt whatever about this case. Once the vesting orders were made, the purchase-money paid into bank, and an order made attaching claims thereto, the claim in respect of the rent ceased to affect the land, and attached to the purchase-money, and must be redeemed or satisfied out of the purchase-money. In this case, therefore, the claim to a perpetuity rent issuing out of the land, to which the Rev. A. W. Streane was absolutely entitled, was, by virtue of the Land Purchase Acts, changed or converted during his life into a claim to payment, out of the purchase-money, of a capital sum, to be ascertained in the prescribed manner, with a right in the meantime to payment of what in sect. 24, sub-s. 5, of the Act of 1903 is called the "annual income of his claim." This, in my opinion, was a purely personal claim, which upon

(1) [1913] 2 I. R. 210. (2) L. R. 10 Ch. 610.

Mr. Streane's death passed to his executor. The case of *Frewen* v. *Frewen* (1) seems to me a perfectly analogous case, and the judgment of James L.J. in that case seems to me to apply with greater force in this case. I will, therefore, pay the redemption price to the executor, but I express no opinion as to the right of parties claiming under the will and codicil.

Solicitors for Barry Meade: *Crookshank, Leech, & Davies.*

J. E. W.

TONGE & TAGGART *v.* MULVEY.

(1914. No. 754.)

Costs—Taxation—Action for Account—Less than £20 found due—Right of Plaintiff to full Costs—Order LXV, rule 3.

An agent, who had been employed to collect certain debts, though called on several times by his principal to furnish an account, failed to do so. The principal brought an action in the Chancery Division claiming, by the endorsement on the writ, an account of all sums received by the defendant as agent for the plaintiffs in the collection of certain debts given to the defendant by the plaintiffs for collection, and which debts the defendant agreed to collect and hand over to the plaintiffs, and claiming payment of the amount found due. An order directing an account was made. The chief clerk found that £17 13*s.* 8*d.* was due to the plaintiffs, and the judge made an order for payment of this amount with costs. The taxing master, being of opinion that Order LXV, rule 3, applied to the case, allowed the plaintiffs only half costs.

Held by the Court of Appeal, reversing the decision of Barton J., that the case did not come within Order LXV, rule 3, and that the plaintiffs were entitled to full costs.

MOTION to review taxation.

The plaintiffs had employed the defendant to collect certain debts due to them, and they and their solicitors had made a number of applications to the defendant to furnish an account, but he failed to do so. The last of these applications was made on July 21, 1914; and on September 29, 1914, the plaintiffs instituted the present action against the defendant, the claim endorsed on the writ being as follows:—The plaintiffs' claim is: (1) For an account of all sums of money received by the defendant as agent

(1) L. R. 10 Ch. 610.

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for the plaintiffs in the collection of certain debts and accounts which were given to the defendant by the plaintiffs for collection, and which debts and accounts the defendant agreed to collect and hand over to the plaintiffs. (2) Payment to the plaintiffs of the amount found due. (3) Further and other relief.

The defendant entered an appearance to the writ, and the plaintiffs by notice of motion applied to the Court under Order XV for an order that the defendant should bring in an account of all sums of money received by him as agent for the plaintiffs in the collection of the debts and accounts given to him for collection; and by an order made on the 14th December, 1914, it was ordered that the defendant should forthwith bring into chambers an account of all such sums, and the plaintiffs were declared entitled to the costs of the motion and order as part of their costs in the action.

In pursuance of this order an account was taken by the chief clerk, who found by his certificate that the defendant had received sums of money as agent for the plaintiffs in the collection of debts and accounts which were given to him by the plaintiffs for collection, and which he agreed to collect and hand over to the plaintiffs, to the amount of £54 4*s.* 9*d.*; and that he had paid or was entitled to be allowed on account thereof the following sums, namely, £21 2*s.* 6*d.*, which he paid to the plaintiffs; £3 10*s.* 0*d.* for his own travelling expenses; 5*s.* for postage and telegrams; and £11 13*s.* 7*d.*, being commission at the rate of 15 per cent. on the said sum of £54 4*s.* 9*d.*, and on £23 12*s.* 1*d.* debts and accounts which were given to him to collect, and which he endeavoured to collect, but which were paid directly to the plaintiffs, the said credits amounting altogether to £36 11*s.* 1*d.*, and that there was a balance due by the defendant to the plaintiffs of £17 13*s.* 8*d.* on that account.

The case came on for further hearing on the 1st November, 1915, and an order was made by the Court as follows:—This Court doth declare that there is due to the plaintiffs by the defendant on foot of the account by said order directed the sum of £17 13*s.* 8*d.*, and doth order that the defendant do pay same, together with the costs incurred in this action when taxed and ascertained, to the plaintiffs by monthly instalments of £2, the first of such payments

to be made on the 1st day of December, 1915; and it is declared that the plaintiffs are entitled to their costs of this motion and order, when taxed and ascertained, as part of their costs in this action."

The taxing master taxed the costs on the principle that the action was an action of contract in which the plaintiffs recovered less than £20, and that therefore Order LXV, rule 3, applied, and the plaintiffs were entitled to only one-half of the ordinary costs. The plaintiffs having objected to the disallowances, the taxing master stated his reasons as follows:—"I am of opinion that Order LXV, rule 3, applies to this case. Under the order in this action of the 1st November, 1915, judgment is given to the plaintiffs for £17 13*s.* 8*d.* and costs. In case the above rule were not to apply, the judge would have given a certificate under the rule. See *Davis* v. *Baird* (1).

The plaintiffs now applied to the Court by notice of motion for an order that it should be referred to the taxing master to review the taxation of the plaintiffs' bill of costs, and that he should be directed to tax the said costs on the basis that Order LXV, rule 3, did not apply.

James Henry for the plaintiffs:—

The taxing master, in his certificate, treats this action as an action of contract, and refers to *Davis* v. *Baird* (1). But the present action is one for an account, and an action for an account is in no sense an action in contract. Actions for an account cannot be remitted under the contract section. They are within the equitable jurisdiction of the Court: Osborne's County Court Practice, 2nd ed., p. 21; Morgan and Davies on Costs, p. 162.

The defendant did not appear.

Cur. adv. vult.

Feb. 3.

BARTON J.:—

This is an application to review taxation. The question is whether Order LXV, rule 3, applies to this action. That rule provides that in case the plaintiff in any action of contract, save as therein provided, shall recover, exclusive of costs, less than £20,

(1) 4 New Ir. Jur. Rep. 233.

Barton J. 1916.

TONGE & TAGGART *v.* MULVEY.

the plaintiff shall be entitled to no more than one half of the ordinary costs, unless the action has been brought for the purpose of trying a right to property more extensive than the sum sued for, and unless there is a certificate or order as provided by the rule.

The plaintiff, on the 29th September, 1914, issued his writ indorsed for an account of all sums of money received by the defendant as agent for the plaintiffs in the collection of certain debts and accounts which were given to the defendant by the plaintiffs, and which debts and accounts the defendants agreed to collect and hand over to the plaintiffs, and for payment of the amount found due.

On notice of motion an order was made on the 14th December, 1914, referring it to the chief clerk to take an account, and the chief clerk's certificate, filed the 25th June, 1915, found £17 13s. 8d. due by the defendant to the plaintiffs, which defendant was directed to pay by order of the 1st November, 1915. Looking at the writ, I hold this to be an action of contract.

Prior to the Judicature Acts there was some distinction, now for most purposes obsolete, between common law and chancery actions for account. Nowadays actions for an account have no sacrosanctity. Some actions of account are not actions of contract, e.g., for accounts between tenants in common. Some actions of account do not depend upon a contractual so much as upon a fiduciary relation, e.g., for accounts against a trustee. But the writ in this action specifically rests the right to an account upon an agreement. A contract is averred in the writ. I lay down no general rule as to actions of account. I limit myself to this action, which I hold to be an action of contract within the terms of the rule.

D. M. S.

April 4.

The plaintiffs appealed (1).

S. L. Brown K.C. (with him *James Henry*), for the appellants:—

Where the claim is for an account against a party legally liable to furnish an account, then whether the amount found due

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN L.C., and RONAN and MOLONY L.JJ.

to the plaintiff is over or under £20, or although in fact a sum may be found due by the plaintiff to the defendant, the case does not come within Order LXV, rule 3. The rule has no application to a case where the plaintiff has obtained other relief than the payment of money: *Bradley* v. *Archibald* (1). The taxing master relied on *Davis* v. *Baird* (2), but the order made by the Court of Appeal in that case, set out in the judgment of FitzGibbon L.J., makes it clear that the ground upon which the Court decided that the rule applied was that the plaintiff had received a sum not exceeding £5, and no further or other relief.

The plaintiffs here applied a number of times to the defendant to furnish an account, and he failed to do so. Their only remedy was to bring the present proceedings in the High Court. An account cannot be ordered in the County Court, except as between partners.

There was no appearance for the defendant.

SIR IGNATIUS J. O'BRIEN L.C.:—

I am sorry that we have not the assistance of counsel on the other side in this case, but I think that I see my way clearly to a decision. At the same time, I wish to guard myself from acceding to certain propositions which were pressed strongly by Mr. Brown. I do not say that they may not be right, but they are not necessary to the decision in the present case, and I should have difficulty in acceding to them to the full extent pressed by him.

The writ in this action was endorsed under Order III, rule 9, with a claim—1, for an account of all sums of money received by the defendant as agent for the plaintiffs in the collection of certain debts and accounts which were given to the defendant by the plaintiffs for collection, and which debts and accounts the defendant agreed to collect and hand over to the plaintiffs; and 2, for payment to the plaintiffs of the amount found due. An order was made under Order XV for the taking of an account, and the chief clerk found that there was due to the plaintiffs the sum of £17 13*s.* 8*d.* An order was made by Barton J. that the defendant should pay them this sum with costs; so that, irrespective

(1) [1899] 2 I. R. 108. (2) 4 New Ir. Jur. Rep. 233.

Appeal. 1916. TONGE & TAGGART *v.* MULVEY. Sir Ignatius J. O'Brien L.C.

of any special jurisdiction to limit the costs, the right of the plaintiffs to recover the sum with costs has been determined in their favour.

The question, however, now arises whether this is an action of contract in which the plaintiffs have recovered a sum of less than £20 within the meaning of Order LXV, rule 3. Barton J. has held that it is, influenced no doubt by the consideration that the total claim to which the plaintiffs' demand could possibly have extended was only about £54, which, having regard to the payments unquestionably made, would be reduced to a much smaller sum, and by the consideration that the matter could have been determined by endorsing the writ for a sufficiently large sum in a common law action for money had and received, and having an account taken in that action by the master, in which case, if it appeared that less than £20 was due, the costs would clearly have been governed by Order LXV, rule 3. I do not blame him for being affected by these considerations. In the course of the argument I expressed my opinion that I could not conceive that, by the mere juggle of endorsing a writ for an account, what would be an ordinary common law action could be transformed into a chancery action; but I am satisfied, on reading the correspondence exhibited in the affidavit on which the original judgment was based, that there existed between the plaintiffs and the defendant the relation of principal and agent; that the agent had refused to account; that the account was one which could be enforced by an action for an account; and that when Barton J. made an order for an account he thereby determined that this was a proceeding, not in the nature of a simple action of contract, but an action of account between principal and agent, a relation of a quasi-fiduciary character, and that the plaintiffs were entitled to bring an action for an account, as distinguished from an ordinary common law action for money had and received. Having determined this, Barton J. still, I think, when the case came before him on further consideration, retained ample jurisdiction in the exercise of his discretion to deprive the plaintiffs of the right which they might have had to costs under a judgment in an action for an account, not being an action of contract within Order LXV, rule 3. But he did not exercise that discretion. He gave judgment for the amount

claimed on the basis of its being the amount found due on an account in an action properly brought for an account, and he gave the plaintiffs the costs of that action. On the record as it stands, therefore, I see no answer to the argument of the appellants that this cannot be treated as being an action of contract coming within Order LXV, rule 3. Accordingly, I cannot agree with the view taken by Barton J., and I think that the appeal must be allowed.

But I must repeat that my decision is based solely on the ground I have stated. I do not lay down any general rule, or express any view which would encourage the bringing of an action on an ordinary money claim in the form of a chancery action, and so evading the rules which limit costs in the case of small debts.

RONAN L.J.:—

I am of the same opinion. The whole of the judgment of Barton J. depends on the last sentence, "I limit myself to this action, which I hold to be an action of contract within the terms of the rule." There can be no doubt that an action for an account between partners, between principal and agent, or between mortgagor and mortgagee, is an action based on contract; but the last sentence of the judgment seems to assume that every action of account based on contract is an action of contract within Order LXV, rule 3. I cannot agree with this.

Order LXV, rule 3, was taken from sect. 3 of the Common Law Procedure Act of 1856, which applied only to common law actions. The writ in the present case was endorsed with a claim for an account, and an application was made under Order XV, which provides that where the writ is endorsed with a claim for an account and the defendant fails to appear or to satisfy the Court that there is some preliminary question to be tried, the plaintiff may, on an application by motion on notice, obtain an order for the proper accounts with the necessary inquiries and directions usual in the Chancery Division in similar cases. By sect. 36, sub-s. 5, of the Judicature Act, the taking of partnership and other accounts is assigned to the Chancery Division.

In *London, Chatham, and Dover Railway Company* v. *South-Eastern Railway Co.* (1), Lindley L.J. mentions as one of the

(1) [1892] 1 Ch. 120, at p. 140.

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Ronan L.J.

cases in which before the Judicature Acts a suit for an account could be maintained in equity:—"Where the plaintiff had a legal right to have money payable to him ascertained and paid, but which right, owing to defective legal machinery, he could not practically enforce at law. Suits for an account between principal and agent, and between partners, are familiar instances of this class of case."

I am satisfied that this is a case in which an account between principal and agent was really required, and not a mere money claim disguised as a claim for an account.

I agree that it would have been competent for Barton J. to have made an order on further consideration limiting the plaintiffs' costs as he thought fit. He has not done so, but has given judgment for the full costs to which the plaintiffs are entitled by law. These, in my opinion, are the costs of a real action for an account between principal and agent and for payment of the balance found to be due as the result of the account.

MOLONY L.J.:—

I also am of opinion that Order LXV, rule 3, does not apply. That rule applies only to cases of an ordinary money demand. This is not such a case. The plaintiffs here were entitled to an account of the sums received, and in the ordinary course of business they applied for such account. Before the present action was instituted, no less than five applications had been made on their behalf, asking for an account to be furnished:—On the 6th June, 1914, on the 27th June, on the 6th July, on the 17th July, and on the 21st July. The plaintiffs waited for two months after the last application before issuing the writ. It was necessary for them to take these proceedings to get an account, and I think therefore that, in the circumstances, Order LXV, rule 3, does not apply.

I also agree that this was a case in which the Court had a discretion to deprive the plaintiffs of costs. Barton J. did not think fit to do so, and the only question we have to consider is the application of Order LXV, rule 3.

Solicitor for the appellants: *J. H. Montgomery.*

J. G. T.

IN RE CONLON AND FAULKENER'S CONTRACT.

M. R.
1916.
April 12, 13.

Vendor and Purchaser—Abstract of Title—Costs of Verification—Proof that Vendor is heir-at-law of deceased Owner in Fee-simple—Proof of Payment of Succession and Estate Duty—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 6—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 11.

Where the vendor's title depends on the fact of his being heir-at-law of a deceased owner of the property, and the fact of his heirship is stated on the abstract, the abstract is complete, and proof of his heirship, by statutory declaration or otherwise, is merely verification of a fact stated on the face of the abstract. Accordingly, by sect. 3, sub-s. 6, of the Conveyancing and Law of Property Act, 1881, the expense of procuring such proof must be borne by the purchaser.

In re Moody and Yates's Contract, 30 Ch. D. 344, distinguished.

An abstract of title which does not show that succession and estate duty, to which the property became liable on the death of a previous owner from whom title is traced, have been paid, or that no duties were payable, is defective; and proof that such duties have been paid, or are not payable, must be furnished by the vendor free of expense to the purchaser.

SUMMONS under the Vendor and Purchaser Act, 1874.

On the 21st January, 1916, Thomas Conlon agreed to purchase from Arthur Faulkener a profit rent of £45 15*s.* 5*d.* issuing out of hereditaments in Belfast held under fee-farm grant. The abstract disclosed that the vendor was selling as heir-at-law of his mother, Mrs. Sarah Little (otherwise Faulkener), who died on the 1st March, 1909. Requisitions on title were furnished by the purchaser's solicitor on the 29th January, 1916, including requisitions requiring evidence of the right of the vendor as heir-at-law, and proof of the payment of succession and estate duty in respect of the premises. The vendor's solicitor in his reply to the first of these requisitions referred the purchaser to sect. 3, sub-s. 6, of the Conveyancing and Law of Property Act, 1881; and replied to the other by stating that all duties payable on the death of Sarah Faulkener had been discharged. Some correspondence ensued between the vendor's solicitor and the purchaser's solicitor, and

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In re Conlon and Faulkener's Contract.

the latter finally stated that his client would be satisfied if the vendor provided, at his own expense, (*a*) a statutory declaration by a competently informed person, showing that the vendor was heir-at-law of Mrs. Sarah Faulkener; (*b*) the Inland Revenue receipt for succession duty payable on the vendor's succession; and (*c*) a certificate of the payment of estate duty under sect. 11 of the Finance Act, 1894. To this the vendor's solicitor replied that he was willing to procure the evidence required, but would only do so at the purchaser's expense.

The present summons was taken out by the purchaser for a declaration that his requisitions in respect of the title to the premises had not been sufficiently answered in reference to these matters.

Carrigan K.C., for the purchaser:—

The summons raises a serious question as to conveyancing practice in Ireland. The vendor contends that, selling as heir-at law of Sarah Faulkener, he can refuse to prove the essential fact of heirship, save at the purchaser's expense. There is no case which decides that sect. 3, sub-s. 6, of the Conveyancing Act, 1881, entitles him to take up this attitude. The proof of his heirship is part of his title, and not merely evidence in verification of it: *In re Moody and Yates's Contract* (1). Sect. 3, sub-s. 6, of the Conveyancing Act, 1881, only applies to the production of documents not in the vendor's possession, or to proof of collateral matters, not to essential matters forming part of the vendor's title: *In re Duthy and Jesson's Contract* (2). The information asked is in the vendor's possession. In *In re Maguire and M'Clelland's Contract* (3) it was not suggested that the statutory declaration given by the vendor in that case should be given at the purchaser's expense.

As regards the Crown duties, sect. 9 of the Finance Act, 1894, makes estate duty an incumbrance on the property; and sect. 11 provides that the commissioners shall, if required, give a certificate showing that estate duty has been or will be paid, which will exonerate a bona fide purchaser. An executor is not bound to pay estate duty on realty: Finance Act, 1894, sect. 6. Sect. 3, sub-s. 6, of the Conveyancing Act, 1881, does not apply to the

(1) 30 Ch. D. 344. (2) [1898] 1 Ch. 419. (3) [1907] 1 I. R. 393.

case of a certificate under s. 11 of the Finance Act, 1894; it puts the expense of proof of collateral matters on the purchaser, but the vendor must still give a satisfactory abstract, and get in all the necessary documents to make the title good.

W. Beattie, for the vendor:—

The purchaser's solicitor is in fact fully conversant with the title. The proof of the vendor's heirship is proof of a collateral matter. In *In re Stuart and Olivant and Seadon's Contract* (1) it was held that the expense of searching for all documents not in the vendor's possession, and required by the purchaser for the purpose of verifying the abstract, not excepting even the deed which was the root of the vendor's title, must be borne by the purchaser.

No succession duty was payable, and the estate duty has been paid. Proof of payment would necessitate the procuring of a certificate not in the vendor's possession, and comes within sect. 3, sub-s. 6, of the Conveyancing Act, 1881.

O'CONNOR M.R.:—

Although the subject-matter of this summons is small, and a very small amount of money is involved, yet the question at issue is of importance. The dispute between the vendor and the purchaser centred ultimately in three points, namely, the right of the purchaser to require the vendor to furnish at his expense—(1) proof that he is heir-at-law of Sarah Faulkener; (2) proof of the payment of succession duty; and (3) proof of the payment of estate duty. There were requisitions made on these three points, and I shall deal with each separately.

The vendor's title depended on his being heir-at-law of one Sarah Faulkener (afterwards Sarah Little) who died on the 1st March, 1909, and the fact of his heirship was stated on the face of the abstract of title; so that, in that respect, the abstract was complete. The purchaser very properly was not satisfied with that statement; presumably he had no knowledge of the fact himself, but, whether or not, it was not unreasonable for him to require that he should be furnished with some evidence of his vendor's

(1) [1896] 2 Ch. 328.

M. R. 1916.

In re CONLON AND FAULKENER'S CONTRACT.

heirship, so that, if he should afterwards himself sell or mortgage the property, he would have something on record which would satisfy a purchaser from him or lender to him. What he ultimately asked was that the vendor should provide (at his own expense) a statutory declaration by a competently informed person showing that he was the heir-at-law of the late Mrs. Sarah Faulkener. The vendor's solicitor had no objection to procuring such a declaration, but contended that the expense must be borne by the purchaser. I suppose that the cost would have been about 6*s.* 8*d.*, but the question of law is, who is bound to pay? The section of the Conveyancing Act, 1881, which deals with the matter is sect. 3, sub-s. 6, which is to this effect:—"On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration and other documents not in the vendor's possession ... and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession ... if any such production, inspection, ... procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same." Now, I do not think that the first clause of the sub-section applies to such a document as a statutory declaration; it seems to me to apply only to what are really muniments of title—documents upon which the title to property depends. But taking the latter portion of the sub-section, and stripping it of all words inapplicable to the present case, the effect of it is this, that the expenses of making a declaration not in the vendor's possession, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same. The question is, how far that provision is applicable to the present case. The document which is required is a declaration not in existence at the present moment; it requires to be made; and it is required merely for the purpose of verifying a fact which is stated on the face of the abstract. It seems to me that this case comes within the very words of the sub-section. The declaration asked for is not required for the purpose of adding to the abstract of title,

or completing it, and this fact, in my opinion, distinguishes the present case from *In re Moody and Yates's Contract* (1). There it was held that the vendor's title depended upon the existence of a particular document, namely, the certificate of the lessors' surveyor that certain buildings had been completed to his satisfaction in accordance with the covenant in the lease under which the premises were held. It was not required for the purpose of verifying the fact that certain work which the lessees were bound to do had been done, but for the purpose of actually making title. That this is so is plain from the judgments of the three judges who decided the case. Brett M.R. says (at p. 347) :—"The value of the lease depended upon the question whether a certain covenant had been fulfilled; that covenant was, that the house should be finished fit for habitation to the satisfaction of the lessors' surveyor. It is necessary to consider the meaning of a covenant of that kind which must be performed in order that the lease may be valid. The covenant does not refer to the satisfaction of the surveyor in his own mind, but it means his expressed satisfaction. That being so, it was necessary that the vendor should state that the expressed satisfaction of the surveyor had been obtained. But it is not stated, and therefore I think that the vendor's title was bad." In other words, it was necessary to the completion of the abstract that there should have been abstracted a document under the hand of the lessors' surveyor certifying that the work which the lessee was obliged to do under his covenant had been done to the surveyor's satisfaction. The same view appears even more clearly from the judgment of Baggallay L.J. at p. 348) :—"The performance of that covenant was a condition precedent to the acquisition of the property by the vendors, and without it they could not lawfully convey it. I agree with the Master of the Rolls that the satisfaction of the surveyor must be expressed in some form, it might be in some form of writing; and I think that a written certificate of satisfaction ought to have been procured. Probably the lessors would have a right of re-entry if the covenant to complete has not been complied with, and the lease would be liable to determine; and there is nothing.

(1) 30 Ch. D. 344.

M. R. 1916.

In re Conlon and Faulkener's Contract.

to show that the lessors' surveyor is satisfied. I think it ought to have been stated in the abstract that the house had been completed to the satisfaction of the surveyor." He held, in effect, that the abstract was incomplete in the absence of the certificate. And Fry L.J. says (at p. 349):—"I think that the approval of the surveyor within his own breast goes for nothing; it is not such a fulfilment of the covenant as could be alleged against a purchaser"; and again, "The certificate of the surveyor's approval is not like a certificate of a pre-existing fact, such as a birth, a marriage, or a death; but it is the fact itself, and forms part of the vendors' title, which must be procured at their expense." The certificate in that case was a document as necessary to make the abstract complete as would be a conveyance or a will, because the vendors' title depended, not on the performance of the covenant, but on the expressed satisfaction of the surveyor.

Here the essential fact necessary to give the vendor a good title was his heirship to Sarah Faulkener; that was a pre-existing fact, and a declaration verifying it would not be part of the abstract. His title does not depend on the declaration; he would still have a good title even though he refused to make the declaration, or was unable to do so, if the fact of the heirship existed.

Mr. Carrigan also referred to *Re Duthy and Jesson's Contract* (1), but that case also seems to me not to apply, because it was only concerned with the ordinary right of a purchaser to have the title-deeds of the property purchased handed over to him on completion. In that case there were title-deeds which were not in the vendor's possession, but in his procurement, and it was held that he was bound to get them up at his own expense.

Therefore, on the first point I am obliged to hold that while the purchaser is entitled to have the fact of the vendor's heirship verified in a reasonable way, the expenses consequent on that verification must be borne by him.

As regards the second point, the purchaser's final position was that he would be satisfied if the vendor would provide (at the vendor's expense) the Inland Revenue receipt for the succession duty payable on the vendor's succession, and a certificate of the

(1) [1898] 1 Ch. 419.

payment of the estate duty under section 11 of the Finance Act, 1894. The reply to that was:—"We are perfectly willing to procure the evidence you require, but, as we have already stated, we will only do so at the purchaser's expense." Now, it is idle to say that any expense was involved; all that was necessary was the writing of a letter to the Inland Revenue authorities. What are the real facts? No succession duty had in fact been payable at all. What, then, is the meaning of such an answer to the purchaser's requisition? The explanation is that the vendor's solicitor gave no real attention to the matter, and was only intent on making the purchaser pay for everything.

If the vendor's solicitor had acted reasonably, he would have pointed out that no succession duty was payable, and I am convinced that the purchaser's solicitor would have been satisfied.

The same remarks apply to the question of estate duty. Section 11 of the Finance Act, 1894, provides that: "The Commissioners on being satisfied that the full estate duty has been or will be paid in respect of an estate or any part thereof, shall, if required by the person accounting for the duty, give a certificate to that effect, which shall discharge from any further claim for estate duty the property shown by the certificate to form the estate or part thereof as the case may be." The reply of the vendor's solicitor to the requisition on this point shows that he was not prepared to meet the purchaser's solicitor fairly and frankly. I think the abstract was incomplete in this respect, because on the death of an owner the estate becomes liable to estate duty, and the abstract should show either that the duty has been paid, or that no duty was payable.

Thus the vendor has succeeded on the first point, and the purchaser on the other two, in respect of which the vendor's solicitor was grossly wrong.

Solicitors for the vendor: *J. A. Leighton & Son.*

Solicitor for the purchaser: *Thomas Maguire.*

A. H. W.

Barton J.
1916.
Jan. 13, 27.

In re SULLIVAN.

SULLIVAN *v.* SULLIVAN.

(1914. No. 986.)

Election—Will—Legacy—Intention—Bequest to wife of Legacy payable out of Shares standing in joint names of Husband and Wife—Bequest of Life Estate in Residue to Wife.

A testator whose property at his death (exclusive of certain stocks and shares standing in the joint names of the testator and his wife, which at his death became, by survivorship, the absolute property of his wife) amounted in value to £1858, by his will gave his wife a legacy of £3000, "same to be paid to her either in cash or in such of my shares (including shares standing in her name jointly with mine) as she may select," and directed his executors to hold the residue of his property upon trust to pay the income to his wife during her life, and after her death to apply two-thirds in favour of a brother's children, and to hold one-third on an educational trust.

Held, that the wife was bound to elect between the benefits conferred by the will, and her claim to any of the stocks and shares invested in the joint names of herself and the testator.

Trial of Action.

The testator, Michael Sullivan, who died on the 9th July, 1914, after certain other legacies, bequeathed to his wife, Alice Meenan Sullivan, the sum of £3000 for her absolute use, "same to be paid to her either in cash or in such of my shares (including shares standing in her name jointly with mine) as she may select." After certain further legacies the testator directed his executors to hold the residue of his property, both real and personal, upon trust to pay the income thereof to his wife during her life, and after her death to apply two-thirds in favour of the children of his brother John, and to apply the income of one-third in encouraging the teaching of the Irish language in the National Schools of Miltown Malbay.

The testator was, at the date of his death, possessed of personal property and assets (including shares and investments in public

companies) to the value of £1858 17*s.* 2*d.*, but was not entitled to any real estate.

The testator had been married in the year 1870 to Mary Meenan, who died in the year 1880, and, on the 16th May, 1883, he went through the ceremony of marriage, according to the rites of the Roman Catholic Church, with Alice Meenan, a sister of Mary Meenan, his deceased wife.

On various dates between the 16th May, 1883, and the 28th August, 1907 (being the date of the passing of the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47)), the testator invested, in the joint names of himself and Alice Meenan, sums of money in stocks and shares, the estimated value at the death of the testator of such investments being £4891 10*s.* 9*d.*

Subsequent to the 28th August, 1907, the testator invested in the joint names of himself and Alice Meenan, his wife, further sums of money in stocks and shares, the estimated value of such investments at the death of the testator being £1748 1*s.* 5*d.*

The plaintiff, the widow of the testator, brought the present action against John Sullivan, one of the children of the testator's deceased brother, John Sullivan, a legatee and executor named in the will, for the administration of the estate of deceased.

The defendant, by his defence, submitted, inter alia, by paragraph 5, that the plaintiff was bound to make her election between the benefits conferred by the will and her claim to any of the stocks and shares invested in the joint names of the plaintiff and the testator.

It was, at the trial, admitted that all these stocks and shares became, at the death of the testator, the absolute property of the plaintiff.

S. L. Brown K.C. (with him *P. Lynch K.C.*, *J. H. Pigot K.C.*, and *Hugh Kennedy*) for the plaintiff:—

Mere general words will not put a person to election: *Miller* v. *Thurgood* (1); *Re Bidwell's Settlement* (2); *Forrester* v. *Cotton* (3); *In re Harris, Leacroft* v. *Harris* (4); *Dummer* v. *Pitcher* (5); *Poole* v. *Odling* (6).

(1) 33 B. 496.
(2) 11 W. R. 161.
(3) 1 Eden 532.
(4) [1909] 2 Ch. 206.
(5) 5 Sim. 35; 2 M. & K. 262.
(6) 31 L. J. Ch. 439.

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1916.
SULLIVAN v. SULLIVAN.

The defendant will rely on *Re Carpenter, Carpenter* v. *Disney* (1); and *Grosvenor* v. *Durston* (2); but in these cases the testator was clearly dealing with another person's property. There is, in the present will, merely a direction to the executors to hold the residue of testator's property coming to them, on certain trusts. How can that be construed as a gift of his wife's property?

Henry K.C. (with him *Murnaghan*), for the defendant:—

Election is always a question of intention. The testator was clearly dealing with his wife's shares as his own. If a testator deals with another person's property as his own, that person must either take under the will, or take nothing under the will, and take against it. The "residue" means the residue after his widow had taken the shares in question. Therefore he dealt with these shares as his own. "My shares" clearly included shares standing in the joint names. "My property" clearly included those shares. Therefore the widow is put to her election: *Whitley* v. *Whitley* (3).

T. H. Maxwell, for the Commissioners of Charitable Donations and Bequests:—

The testator has dealt with his wife's shares as his own, and therefore she is put to her election. If the construction on the other side is correct, there will be no residue, and the legacies will all abate.

Lynch K.C., in reply.

Cur. adv. vult.

Jan. 27.

BARTON J.:—

The only question remaining for decision is whether the widow of the testator is bound to make her election to take under the will of her husband or against it.

The testator, on the 16th May, 1883, married according to the rites of his Church his deceased wife's sister. In view of the then state of the law he, from time to time between that date and the 28th August, 1907, being the date of the passing of the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47), invested sums

(1) 51 L. T. 773.
(2) 25 B. 97.
(3) 31 B. 173.

of money in the joint names of himself and his wife. These sums amounted to £4891 0*s.* 9*d.* at the time of his death. Subsequent to the 28th August, 1907, the testator invested further sums of money amounting to £1748 10*s.* 5*d.* in the joint names of himself and his wife. It is now admitted that at the testator's death all these stocks and shares became the absolute property of the wife.

At the time of his death the testator had property of his own to the value of less than £2000. By his will, dated the 2nd October, 1913, and executed about eight months before his death, after a few small legacies the testator bequeathed to his wife the sum of £3000 for her absolute use, same to be paid to her either in cash or in such of "my shares (including shares standing in her name jointly with mine) as she may select," and also bequeathed to her all his furniture, books, linen, bronzes, curios, and household goods, and he left £150, free of legacy duty, to each of the children of his deceased brother John, the legacy of any child who might predecease the testator leaving issue at the testator's death, to go to that issue in equal shares. After these dispositions the testator directed his executors to hold the residue of his property upon trust to pay the income to his wife for her life, and after her death to apply two-thirds in favour of the children of his brother John and their issue, and one-third upon an educational charitable trust.

In order to raise a case of election in a will there must appear on the face of the will a clear intention on the part of the testator to dispose of property which was not his own. In the present case we have to consider whether the benefits conferred upon the wife comprised property which was not the testator's but hers. If she claims *dehors* the will part of the property bequeathed to her by the will, she is bound to elect whether she will take under the will or against it. She cannot at the same time approbate and reprobate.

Parol evidence is not admissible to prove the intention of the testator to dispose of what was not his own. The intention must appear somewhere in the will, and must be clearly expressed. *Dummer* v. *Pitcher* (1) was a strong example of the strictness of the rule that there must be an explicit disposition of property not the testator's. In view of that decision it is clear that the terms in

(1) 2 M. & K. 262.

Barton J. 1916 SULLIVAN *v.* SULLIVAN.

which the residuary bequest in this case is made do not *per se* raise a question of election, and that the case turns upon the effect of the words explanatory of the bequest of £3000, which direct that the bequest of £3000 is to be paid to the wife either in cash or in "such of my shares (including shares standing in her name jointly with me) as she may select."

I cannot give any other meaning to those words than that the testator treated as his shares the shares standing in the joint names. He included them under the descriptive words "my shares." It is immaterial whether he was labouring under some mistake. Perhaps he misunderstood the effect of the change which had been made in the law. It is immaterial whether the selection which is referred to in the bequest was to be exercised by the executors or by the legatees. In my opinion, the terms of this bequest are only consistent with one hypothesis, namely, that the testator was treating the shares standing in the joint names as his own property which he was disposing of under his will. If so, it follows that the residue of those shares were intended to be included in the residuary bequest. If he contemplated subtracting some of those shares for the purpose of making up the £3000 legacy, he must have contemplated that what remained after that subtraction would pass as residue. The residuary bequest included all shares standing in the joint names at testator's death, after subtracting any shares selected to make up the £3000 legacy. A bequest in that form would be specific: *Bothamley* v. *Sherson* (1), *per* Jessel M.R., at p. 309. The will is, in my opinion, so expressed as to make it quite clear that he had in mind and was disposing of specific property belonging to his wife. That being so the widow is bound to elect, and the defendant is entitled to a declaration in the terms of paragraph 5 of the defence.

Solicitor for the plaintiff: *Daniel Purcell.*

Solicitor for the defendant: *James Riordan.*

Solicitors for the Commissioners of Charitable Donations and Bequests: *Maxwell & Meldon.*

D. M. S.

(1) L. R. 20 Eq. 304.

NUNAN *v.* MURPHY.

(1912. No. 160.)

Ross J.
1916.
April 3.

Practice—Administration of Intestate's Estate—Allocation of Funds between Next-of-Kin—Partial Division of Assets in unequal Amounts—Interest allowed on Amount underpaid.

By an order made on further consideration in a suit for the administration of the personal estate of an intestate, a partial division between the plaintiff and the defendant (the only next-of-kin) of assets consisting of mortgage debts and Consols was made, but in unequal amounts, the value of the assets transferred to the defendant being less than those transferred to the plaintiff. The final allocation schedule provided for payment to the defendant out of the funds in Court of the sum of £916 8*s.* 1*d.*, being the amount by which he was underpaid, and for division of the residue between the plaintiff and the defendant. The defendant claimed in addition interest on the £916 8*s.* 1*d.* from the date of the order on further consideration.

Held, that the defendant was entitled to payment of interest on the £916 8*s.* 1*d.* at 4 per cent. from the date of the order on further consideration.

SUMMONS.

This was an application by the plaintiff to allocate the funds in this matter pursuant to order dated the 14th July, 1913.

In 1912, proceedings were instituted by summons to administer the personal estate of Ellen M. Downey, who died intestate, by Thomas Nunan, her administrator and one of her next-of-kin. The defendant, the Reverend James Murphy, was the only other next-of-kin.

Thomas Nunan, the plaintiff, afterwards became a lunatic, and Patrick Hunt was appointed his committee, and an order was made continuing the proceedings in the name of Patrick Hunt as plaintiff. At the date of the order on further consideration made on July 14th, 1913, a considerable portion of the personal estate was outstanding, and a sum of £580 3*s.* 1*d.* was found to be due by the plaintiff on foot of his account of the personal estate. By that order the judge directed that the sum should be credited on allocation against the plaintiff's distributive share of the assets of the intestate as one of his next-of-kin, and the plaintiff agreed to take as part of his distributive share three mortgage debts due to the intestate which were bearing interest, amounting in all to

Ross J. 1916.

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£1800. It was further ordered that £2000 New Consols be transferred to the defendant on account of his distributive share as one of the next-of-kin of the intestate, he to give credit for the same at the price of the day of transfer on the allocation of the funds, and the judge declared the next-of-kin set out in the chief clerk's certificate (*i.e.*, the plaintiff and the defendant) entitled to the residue of the assets after making provision for all prior payments, and ordered that the funds in Court be allocated, having regard to the foregoing declaration and direction as to credits.

When the allocation schedule came to be prepared, it appeared that the plaintiff had received or got credit on account of his share for the sum of £2380 3*s.* 1*d.* (viz., the £1800 mortgaged debt and the £580 3*s.* 1*d.* due by him to the estate), and that the value of the assets transferred to the defendant was £1463 15*s.*, or £916 8*s.* 1*d.* less than the said sum of £2380 3*s.* 1*d.* The funds in Court consisted of £854 14*s.* 7*d.* cash, £2839 8*s.* 7*d.* New Consols and April dividend, and £1572 3*s.* 7*d.* on deposit account. The allocation schedule prepared by the chief clerk accordingly provided for payment to the defendant out of the funds in Court of the sum of £916 8*s.* 1*d.*, and for the division of the residue equally between the plaintiff and the defendant.

The defendant's solicitors contended before the chief clerk that he should be allowed interest on the £916 8*s.* 1*d.* from the 14th July, 1913, but the chief clerk disallowed his claim.

The allocation schedule came on for hearing before Ross J., sitting in chamber for O'Connor M.R.

Poole, for the defendant.
Timothy Sullivan, for the plaintiff.

Ross J. made an order as follows:—

The judge doth declare the defendant entitled to interest at 4 per cent. per annum from the said 14th day of July, 1913, on the sum of £916 8*s.* 1*d.*, the amount by which the sum retained by the plaintiff pursuant to the said order exceeded the sum paid to the defendant pursuant to the said order.

Solicitor for the plaintiff: *Anthony Carroll.*
Solicitors for the defendant: *O'Connor & Dudley.*

W. L.

Barton J.
1916.
June 26.
July 12.

IN RE M'CANN.

DONNELLY *v.* MOORE.

Will—Construction—"Family."

The primary meaning of the word "family" in a will is "children."

A testator bequeathed his farm of land to his nephew, and, "if he does not marry and have a family at his death," over. The nephew married, and died leaving a widow but no children.

Held, that the gift over took effect.

ORIGINATING SUMMONS.

Peter M'Cann made his last will, dated the 24th July, 1915, and died on the 28th July, 1915. The will, so far as is material to the present report, was as follows:—"I give and bequeath to my nephew Bernard Moore who resides with me the farm of land known as Moore's farm, and one cow and a calf; if he does not marry and have a family at his death, this farm is to go to his nephew John Moore, son of Patrick Moore, and, if he be dead, to his brother Patrick, or such of his sisters as the executors may think right."

The executors assented to the bequest of the farm to Bernard Moore, who entered into possession and receipt of the rents and profits of the farm. Bernard Moore married Elizabeth Moore and died on the 9th March, 1916, intestate, leaving surviving him his widow, Elizabeth Moore, but no issue.

The executors brought the present summons against Elizabeth Moore and John Moore for the decision of (inter alia) the question whether the gift over of the farm to John Moore had become effective.

Cecil Lavery for the plaintiffs.

J. H. Monroe for Elizabeth Moore:—

The gift over to John Moore did not take effect. Bernard Moore married and left a widow, but no children. Marrying

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and leaving a widow is a satisfaction of the condition on which Bernard was to take absolutely: *In re Chant, Chant* v. *Lemon* (1); *Roberts* v. *Bishop of Kilmore* (2). The gift over was only intended to take effect on the happening of both contingencies, not marrying and not having a family: *Carolin* v. *Carolin* (3).

T. J. Campbell for John Moore:—

The gift over to John Moore took effect. "Family" in this will has its ordinary meaning of "children."

Cur. adv. vult.

BARTON J.:—

The question for decision is whether the word "family" in this bequest means "wife or children" or "children" only. In ordinary parlance the word has many significations, but no primary meaning. Everything depends upon the context. But in the construction of bequests it is settled that the primary meaning of the word "family" is children, unless the context or the circumstances shows that it has a wider or a different meaning: *per* Turner V.-C. in *Gregory* v. *Smith* (4), and *per* Jessel M.R. in *Pigg* v. *Clarke* (5). In the present will there is not, in my opinion, sufficient in the context, or in the circumstances, to enable the Court to give the word any wider or different meaning than its primary meaning—"children." Accordingly, the gift over took effect, and the farm passed to John Moore, son of Patrick Moore.

Solicitors for the plaintiffs: *Patrick Lavery & Son.*
Solicitors for Elizabeth Moore: *Monroe & Anderson.*
Solicitor for John Moore: *Edward O'Hagan.*

D. M. S.

(1) [1900] 2 Ch. 345.
(2) [1902] 1 Ch. 333.
(3) 17 L. R. Ir. 25, note.
(4) 9 Hare 708.
(5) 3 Ch. D. 672.

CLARK *v.* DOHERTY.

(1913. No. 730.)

Barton J.
1916.
Jan. 18, 21.
Feb. 3.

Practice—Administration—Mortgage—Sale of mortgaged Property—Insolvent Estate—Secured Creditor—Salvage Creditor—Proof, Withdrawal of—Costs.

In an administration suit, by the decree on further consideration, the plaintiff was declared a salvage creditor, and a Mrs. G. was found to be the first mortgagee of premises which were ordered to be sold. Both the plaintiff and Mrs. G. proved against the general personal estate. The estate turned out to be insolvent. Mrs. G. applied for liberty to withdraw her proof of debt against the general personal estate and rely on her security in order to get the benefit of the rule in *Hilliard* v. *Moriarty*, [1894] 1 I. R. 316, 319.

Held, that the applicant was entitled under the circumstances to withdraw her proof of debt on payment of the costs of the application, and that the fact that the plaintiff was a salvage creditor did not prevent the application of the rule in *Hilliard* v. *Moriarty*, [1894] 1 I. R. 316, 319.

SUMMONS.

On the 20th March, 1883, Mrs. Jane Gamble registered a judgment mortgage against the lands of the deceased intestate, Charles Doherty, situate at Drumaboden in County Donegal, held under a tenancy from year to year.

Messrs. Wilson & Simms, as solicitors for Mary Gallagher, owner of a judgment mortgage registered against the same lands on the 12th April, 1912, paid the sum of £78 3*s.* 6*d.* to the landlord to save the lands of Drumaboden from eviction. There was subsequently a letter from Mr. Wray, Mrs. Gamble's solicitor, to plaintiff's solicitor, which Barton J. held invited plaintiff to make another salvage payment, but did not expressly or impliedly invite or authorize Mary Gallagher or her solicitors to institute an administration suit.

Messrs. Wilson & Simms took action to protect themselves in

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respect of the money advanced by them to pay the rent of the farm of Drumaboden. There was no personal representative of the deceased, and accordingly they, as creditors, on 28th July, 1912, procured a grant of administration to the plaintiff, Robert Clark, as their nominee, on an allegation of the intestacy of the deceased, and instituted the present proceedings for administration of the estate of the deceased. Judgment for such administration was granted on the 3rd November, 1913.

After the said judgment for administration and pursuant thereto, Mrs. Gamble sent in a proof on foot of her judgment mortgage showing that the total amount due to her by the deceased at the date of his death was the sum of £243 8*s.* 10*d.* for principal, together with £4 0*s.* 4*d.* costs of registering the judgment as a mortgage.

After and in pursuance of the said judgment, both the plaintiff and Mrs. Gamble sent in their claims as creditors. The lands of Drumaboden were held by the deceased on a tenancy from year to year, and as the judgment for administration directed only an inquiry for incumbrances affecting the freehold registered land of the deceased, the claim of Mrs. Gamble was inserted only in the first schedule of the certificate of the chief clerk, which schedule contained the list of the ordinary creditors of the deceased.

In January, 1914, both Mrs. Gamble and the plaintiff proved as ordinary creditors without valuing their securities.

By order on further consideration, dated the 7th July, 1914, a sale of the lands of Drumaboden was directed, and the order also directed an inquiry as to the incumbrances affecting the same and their respective priorities, and authorized Mrs. Gamble to lodge any documents or deeds affecting the said lands, subject to her right of lien; and it was declared that the plaintiff, Robert Clark, the nominee of Messrs. Wilson & Simms, was a salvage creditor of the deceased, and was entitled to be paid the sum of £78 3*s.* 6*d.* out of the proceeds of the sale of the lands of Drumaboden in priority to the incumbrances affecting these lands.

The inquiry for incumbrances affecting the lands was duly held, and Mrs. Gamble was admitted as first incumbrancer in respect of said lands.

There was a statement in an affidavit made by Mr. Wray, the

solicitor for Mrs. Gamble, that neither he nor she (so far as he was informed and believed) had any knowledge that the estate of the deceased was insolvent or was likely to prove insolvent, or that Mrs. Gamble had in any way waived her rights under her judgment mortgage; and that it was with the entire acquiescence of the plaintiff's solicitors that the said judgment mortgage was certified as aforesaid as the first incumbrance affecting the said lands.

The lands were sold for the sum of £500, and conveyed to a purchaser with the concurrence of the applicant in the conveyance which recited her judgment mortgage.

On the 16th July, 1915, the plaintiff brought in a schedule allocating the funds in Court. The allocation was carried out on the basis that the estate was insolvent, and that the assets, including the proceeds of Drumaboden, were liable for costs. "This," Mr. Wray said in his affidavit, "was the first intimation that I had that the estate of the deceased was insolvent. I am informed by the said Jane Gamble, and believe, that until I so informed her, after the receipt by me of the said allocation schedule, she had no knowledge that the said estate of the said deceased was insolvent. By the said allocation schedule the said Jane Gamble is treated as having waived her said judgment mortgage by being included in the list of creditors against the general personal estate, and the said allocation schedule proposes to allocate the proceeds of the sale of the said lands of Drumaboden as if the said Jane Gamble had no judgment mortgage on the same, but was only a simple contract creditor of the said deceased."

On the 25th November, 1915, the present summons was issued on behalf of Mrs. Gamble, asking for an order declaring that her judgment mortgage of 20th March, 1883, registered against the lands of Drumaboden, was a valid judgment mortgage affecting the proceeds of the sale of the said lands, and that Mrs. Gamble had not abandoned or waived her rights under the said judgment mortgage, and that, if necessary, she might be authorized to withdraw her proof on foot of the said judgment mortgage against the general personal estate of the deceased, and to rely on her said security.

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Osborne K.C. (with him *Woods*), for the applicant:—

The applicant, at the time when the proof against the general personal estate was sent in, had no knowledge that the estate was insolvent. The judgment mortgage is expressly referred to in the order on further consideration as a valid security. In the certificate of incumbrances affecting the premises it is certified as the first incumbrance, and the plaintiff procured the concurrence of the applicant in the conveyance of the premises to the purchaser carrying out the sale in the suit, and this conveyance recites the judgment mortgage of the applicant. It was only after this conveyance, on allocation, that the applicant had any knowledge that the estate was insolvent. In *Cooper* v. *Teahan* (1), the judgment of FitzGibbon L.J. is authority for the claim of the applicant for leave to withdraw her proof against the general personal estate. *In re Hopkins* (2) is distinguishable, as the secured creditor in that case was the plaintiff, and knew all about the circumstances of the estate, and had actually valued his security on the basis of an insolvent estate, and afterwards wished to alter his valuation. There has been no deliberate election either to value or stand on a security in this case. In *In re Cloghessy* (3) the several creditors, who proved against the general personal estate, knew that the estate was insolvent. If the decision in that case goes any further, it is impliedly overruled by the decision of the Court of Appeal in *Cooper* v. *Teahan* (1). The Judicature Act introduced into the administration of insolvent estates in the Chancery Division the rules in bankruptcy. It is, and always has been, a rule in bankruptcy that when a creditor inadvertently proves, without having regard to a security he may have, to allow such proof to be withdrawn: *Ex parte Clarke* (4); *In re Holmes* (5). If the applicant has not elected to abandon her security, the case is ruled by *Hilliard* v. *Moriarty* (6). The fact that the applicant proved against the general personal estate does not make any distinction: *M'Aloon* v. *M'Aloon* (7); *Cusack* v. *Cusack* (8).

(1) 23 L. R. Ir. 203, 209.
(2) 18 Ch. Div. 370.
(3) 21 L. R. Ir. 388.
(4) 67 L. T. 232.
(5) 9 I. L. T. R. 67.
(6) [1894] 1 I. R. 316.
(7) [1901] 1 I. R. 470.
(8) 37 I. L. T. R. 152.

The salvage payment by the plaintiff does not distinguish *Hilliard* v. *Moriarty* (1) from the present case.

The plaintiff, by the order on further consideration, was allowed his costs as executor's costs payable out of the general personal estate, and cannot now have these costs in any other priority: *Dighton* v. *Withers* (2); *Wonham* v. *Machin* (3).

Babington, for the plaintiff:—

The real question here is as to whether plaintiff's costs are to be paid out of the proceeds of Drumaboden in priority to the claim of Mrs. Gamble as mortgagee. Messrs. Wilson & Simms are the real plaintiffs, Robert Clark being their nominee.

This application is too late. Mrs. Gamble elected to prove against the assets when she sent in her proof: *In re Cloghessy* (4). The rules in bankruptcy and General Order LXXXVIII, Rule 86, provide that a secured creditor in bankruptcy unless he shall have realized his security shall, previously to being allowed to prove or vote, state in his proof the particulars of his security, and the value at which he assesses the same, and he shall be deemed to be a creditor only in respect of the balance due to him after deducting such assessed value. Mrs. Gamble proved without valuing her security, and thereby abandoned it. Mr. Wray, her solicitor, must have known that the estate was insolvent. It clearly appeared to be insolvent from the chief clerk's certificate, and Mrs. Gamble was represented by counsel on the hearing on further consideration. But even want of knowledge of insolvency does not entitle a creditor to withdraw a proof once entered.

Section 28, sub-s. 1, of the Judicature Act (Ireland), 1877, which introduces the rules of bankruptcy into the administration of insolvent estates, enacts:—"In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities," the rules in bankruptcy shall apply. So that future insolvency is contemplated, and the proof must guard against future insolvency, as in *Cooper* v. *Teahan* (5). This is clear from *In re Leng* (6), which

(1) [1894] 1 I. R. 316, 319.
(2) 31 B. 423.
(3) L. R. 10 Eq. 447.
(4) 21 L. R. Ir. 388.
(5) 23 L. R. Ir. 203, 209.
(6) [1895] 1 Ch. 652.

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decides that the bankruptcy rules apply to an estate solvent but for the costs of suit; and in *In re Hopkins* (1), the Court of Appeal in England held that the creditor is presumed to know that the estate is insolvent. To hold that the proof is only binding when made with the knowledge of insolvency would dislocate the whole practice of the Court. Proof would never be conclusive, as in most cases it precedes the ascertainment of insolvency, and we submit that the section of the Judicature Act and the bankruptcy rule show that knowledge is immaterial.

No doubt leave has been given in some cases to withdraw proof, but only as a favour, where no persons were prejudiced and on terms of foregoing costs. The application here recognizes that the form of proof is an abandonment of the security, and the applicant has not shown any valid reason for being allowed to withdraw. Her case was that she made a mistake. The Court should not assist her, seeing that the suit has proceeded, and the lands have now been sold, upon the basis that her security was abandoned, and all the costs incurred since her proof was entered have been incurred on this basis. Moreover, the applicant adopted the suit, and was awarded costs of applying on further consideration, and on the taxation of the costs. She would have had to incur most of these costs if she had taken proceedings herself, and cannot object now that Messrs. Wilson & Simms have incurred them on her invitation.

In *Ex parte Clarke* (2) there was mere inadvertence. The lands were not sold, and no one was injured. In *In re Holmes* (3) the facts were entirely different. In *M'Aloon* v. *M'Aloon* (4), *In re Cloghessy* (5) was not cited, and the point at issue here was not taken; moreover, in that case no one was prejudiced, and the mortgagee did not come in on further consideration or adopt the suit in any way.

Even if the Court allows Mrs. Gamble to withdraw her proof, Messrs. Wilson and Simms are entitled to their costs as salvage creditors. They have been declared entitled to a first charge, and in respect of that claim are entitled at any rate to their costs of

(1) 18 Ch. D. 370.
(2) 67 L. T. 232.
(3) 9 I. L. T. R. 67.
(4) [1901] 1 I. R. 470.
(5) 21 L. R. Ir. 388.

sale. That they are in the same position as any other mortgagee is clear from the judgment in *In re Power's Policies* (1). There are special circumstances taking this case out of the decision in *Hilliard* v. *Moriarty* (2). They have now a first charge on the mortgaged lands. They were compelled to take action by the letter written to them on behalf of Mrs. Gamble, and the mortgagee abandoned her security and adopted the suit.

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It is submitted that the applicant should not be allowed to withdraw her proof, and that if leave is given it should be on terms of paying all costs incurred by the plaintiff since the proof was entered. [He also referred to *Cope* v. *Breslin* (3).]

BARTON J. :—

Feb. 3.

This is a creditor's administration suit. By the decree on further consideration the plaintiff was declared a salvage creditor, and Mrs. Gamble was found to be the first incumbrancer. The estate turns out to be insolvent. Both the plaintiff and Mrs. Gamble sent in claims as ordinary creditors, and proved against the general personal estate. Mrs. Gamble, as first mortgagee, now applies to be allowed to withdraw her proof and to rely upon her security. She makes the application with the object of getting the benefit of the rule in *Hilliard* v. *Moriarty* (2) as to costs of sale. Unless there are special circumstances, which would make the case an exception to that rule, the application ought, in my opinion, to be granted.

The plaintiff relies upon a letter written by the applicant before action, inviting the plaintiff to make a further salvage payment, and upon the fact that the plaintiff is a salvage creditor with priority, as such, over all incumbrancers including the first mortgagee.

As regards the applicant's letter, it is true that it invited the plaintiff to make a further salvage payment, but I cannot say that it invited him to bring an administration suit. It did not do so directly. I do not think it did so impliedly. That being so,

(1) [1899] 1 I. R. 6.
(2) [1894] 1 I. R. 316, 319.
(3) [1901] 1 I. R. 466.

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it can hardly be regarded as a waiver of the ordinary rights of a first mortgagee in a suit of this kind.

As regards the salvage point, which weighed with me during the argument, I have been referred to *Hurley* v. *Denny* (1), in which, as between a first mortgagee and a plaintiff who was a salvage creditor, the Court of Appeal held that the rule in *Hilliard* v. *Moriarty* (2) applied. I am of opinion that, in accordance with that decision, the applicant should be allowed to withdraw her proof upon the terms of paying the costs of the application.

Solicitors for the plaintiff: *Wilson & Simms.*
Solicitor for the applicant: *John Wray.*

R. W. L.

(1) C. A., May 2nd, 1895. The following is a note of the case taken from the Registrar's book:—

HURLY *v.* DENNY.

(Before the LORD CHANCELLOR and LORDS JUSTICES.)

This was an appeal from portion of an order of the Vice-Chancellor, dated the 12th March, 1895, so far as same declared that out of the moneys in Court the mortgage debt due to Colonel Rowan, with interest and costs, was payable in priority to appellant's costs of the action. The appellant, who was a salvage creditor, was plaintiff in the action, and executor of Lucy Anne Thompson, deceased.

M. J. Bourke Q.C., for appellant:—

The Vice-Chancellor thought that the present case came within the principle of the decision of the Court of Appeal in *Hilliard* v. *Moriarty*, [1894] 1 Ir. 316, 319, but we submit that it does not apply. [He cited *In re Spenley's Estate* (L. R. 15 Eq. 16); *Pinchard* v. *Fellows* (L. R. 17 Eq. 421).]

Gerald FitzGibbon follows:—

Our claim has been declared a salvage claim. If the money was spent in redeeming the farm in the matter, it is a salvage payment and the costs were expended in obtaining that. [He cited *Maguire* v. *Dundass* (1 Ir. Eq. Rep. 25); *Gray* v. *Crawford* (*ib.* 274); *Kelly* v. *Kelly* (*ib.* 317); *Drake* v. *Forde* (3 Ir. Eq. Rep. 55).]

Twigg Q.C. and *Orpen*, for respondent, cited *Millar* v. *Johnston* (23 L. R. Ir. 50); *Ross* v. *Ross* (29 L. R. Ir. 318).

THE LORD CHANCELLOR:—

We refuse this appeal with costs. We hold that the decision of the Vice-Chancellor was right.

(2) [1894] 1 I. R. 316, 319.

O'FLAHERTY *v.* GETHINGS.

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July 3.

Practice—Judgment—Contract—Judgment Mortgage—Originating Summons by Mortgagee for a Sale — Leave to institute Proceedings — Courts (Emergency Powers) Acts, 1914 *to* 1916 (4 *&* 5 *Geo. 5, c.* 78), *s.* 1, *sub-s.* 1; (6 *Geo. 5, c.* 18), *s.* 1, *sub-s.* 1 (*b*).

Under the provisions of sect. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1914, as extended by the Courts (Emergency Powers) Act, 1916, sect. 1, sub-s. 1 (*b*), it is necessary to obtain the leave of the Court before instituting proceedings to raise by sale the amount of a judgment mortgage, even though the judgment on which the mortgage was founded was obtained after the 4th August, 1914, where the debt in respect of which the judgment was obtained was due under a contract made before that date.

ORIGINATING SUMMONS.

This was an application on behalf of the plaintiff for—(1) a declaration that a certain judgment mortgage for the sum of £316 18*s.* 7*d.* entered up pursuant to sect. 6 of the Judgment Mortgage (Ireland) Act, 1850, by the plaintiff on the 26th August, 1914, against the interest of the defendant in certain lands in county Wexford was well charged to the extent of £310 12*s.* 7*d.* thereof upon the interest of defendant in said lands, and that a certain other judgment mortgage for £35 6*s.* 3*d.* entered up pursuant to the said section of the said Act on the 13th April, 1916, against the interest of the defendant in the said lands, was well charged upon interest of the defendant in the said lands; (2) That accounts might be taken of what was due by the defendant to the plaintiff on foot of the said judgment mortgages respectively; (3) That in default of payment of the moneys found to be due on such accounts, the same might be enforced by a sale of the said lands, or of a competent part thereof, or by a receiver or both, as the judge should direct; (4) Further or other relief; (5) costs.

In an action in the King's Bench Division it was, on the 1st July, 1914, ordered that judgment should be entered for the plaintiff in the present summons (who was a solicitor) against the defendant and another for such amount as should, on taxation, be found

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due on certain bills of costs upon which the action had been brought, and also for such amount as should, upon taxation, be found due as and for the costs of claim in the action. On the 25th August, 1914, judgment was duly entered for the plaintiff against the defendants in the said action for the sum of £316 18*s.* 7*d.*, the sum certified due on taxation. On the 26th August, 1914, the plaintiff registered this judgment for £316 18*s.* 7*d.* as a mortgage against the interest of one of the defendants in the action (who was the defendant in the present summons) in certain lands in the county Wexford. On the 27th November, 1914, upon a motion to review taxation, the amount of the judgment was, by a consent order, reduced to £310 12*s.* 7*d.*

On the 29th November, 1914, the defendants in the action moved for a new trial, and their application was refused with costs, which were subsequently taxed at the sum of £34 14*s.* 3*d.*, which sum was duly entered by the plaintiff as a judgment against these defendants. The plaintiff made application under the Courts (Emergency Powers) Act, 1914, to the King's Bench Division for leave to issue execution on foot of the judgment for £34 14*s.* 3*d.*, which application was granted with twelve shillings costs against the defendants in the action, making the total amount of the said judgment £35 6*s.* 3*d.* On the 13th April, 1916, the plaintiff registered this judgment as a mortgage against the interest of the defendant in the summons in the lands of Wexford already mentioned.

F. W. Price, for the defendant :—

The present summons is irregular, and the Court has no jurisdiction to entertain it, because the necessary leave to institute the proceedings has not been obtained. The Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78), sect. 1, sub-s. 1, provides that :—"From and after the passing of this Act no person shall . . . (*a*) proceed to execution, or otherwise to the enforcement, of any judgment or order of any Court (whether entered or made before or after the passing of this Act) for the payment or recovery of a sum of money to which this sub-section applies, except after such application to such Court and such notice as may be provided for by rules or directions under this Act ; or (*b*) levy any

distress, take, resume, or enter into possession of any property, exercise any right of re-entry, foreclose, realize any security . . . except after such application to such Court and such notice as may be provided for by such rules or directions under this Act." The Courts (Emergency Powers) (No. 2) Act, 1916, sect. 1, sub-s. 1 (*b*), enacts that "the provisions" in the Act of 1914 "relating to foreclosure shall extend to the institution of proceedings for foreclosure or for sale in lieu of foreclosure." The provisions are very clear and express, and as plaintiff has not fulfilled the requirements necessary to enable him to ground the present application, it should be refused with costs.

Swayne for the plaintiff:—

The preliminary point taken is not sustainable. Both the judgments were entered after the crucial date—the 4th of August, 1914. A judgment is a contract or obligation of record, and consequently the amount due on each judgment in this case is "due and payable in pursuance of a contract made after the beginning of the 4th day of August, 1914," within the meaning of the exception in sect. 1 of the Act of 1914. Consequently, no application was necessary previous to the issue of the present summons, though, as a matter of fact, an application under the Courts (Emergency Powers) Act, 1914, has already been made to the King's Bench Division for liberty to issue execution on foot of the judgment for £34 14*s.* 3*d.*, and such application has been granted. The procedure we adopt here is not execution to raise the amount. The registration of a judgment as a mortgage is not "execution": *Barnett* v. *Bradley* (1).

Price in reply:—

It is true that each debt became a judgment after the 4th August, 1914, but the amount in respect of which judgment was entered became due and owing before the 4th August, and so this case does not come within the exception in sect. 1 of the Act of 1914. A judgment is a mode of securing a debt due under a pre-existing contract. The debt is recovered by the plaintiff by virtue of the judgment. Neither of these judgments now in question can possibly constitute a "contract" within the meaning of sect. 1,

(1) 26 L. R. Ir. 209.

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sub-s. 1, of the Courts (Emergency Powers) Act, 1914. That exception applies only to contracts made by agreement between the parties, and not to a subsequent judgment obtained on foot of such contract. [He referred to *Hodsoll* v. *Baxter* (1).]

BARTON J.:—

Mr. Swayne contends that this judgment was a "contract" within the meaning of the exception in sub-sect. 1 of sect. 1 of the Courts (Emergency Powers) Act, 1914. It is true that it was a contract of record; but it was not, in my opinion, a contract within the meaning of this enactment, which contemplates contracts depending upon agreement. In the absence of the requisite notice under the Courts (Emergency Powers) Act (No. 2), 1916, this application must be refused with costs.

Solicitors for the plaintiff: *P. J. O'Flaherty & Son.*
Solicitors for the defendant: *William Findlater & Co.*

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IN RE FORTESCUE'S ESTATE.

Land Purchase Acts—Sale—Mortgage—Covenant by Mortgagor to give twelve months' Notice of Intention to pay off, or to pay twelve months' Interest in lieu thereof—Clog on Equity of Redemption—Irish Land Act, 1903, sect. 24, sub-s. 6.

A mortgagor of lands sold the lands under the provisions of the Irish Land Act, 1903. The mortgage, made in the year 1900, contained a proviso that, if interest were duly paid, the mortgagee should not require payment of the principal for ten years, or after that period without twelve months' notice; and a proviso that the mortgagor should not be at liberty to pay off any part of the principal before the expiration of ten years, nor after the expiration of that period without giving twelve months' notice; and a further proviso that, in the event of the mortgagees having (owing to a compulsory sale or otherwise) to accept payment without having received twelve months' notice in writing of intention to pay same, they should be entitled to twelve months' interest in addition to the principal and interest payable under the mortgage. No actual notice of intention to pay was served on the mortgagees, but more than twelve months expired between the service of the final notice to incumbrancers and the distribution of the purchase-money.

(1) E. B. & E. 884.

Held by the Court of Appeal (reversing the decision of Wylie J.), that the proceedings in the Land Commission did not amount to notice to the mortgagees within the meaning of the covenant, and that they were accordingly entitled to be paid out of the proceeds of the sale twelve months' interest in lieu of notice, in addition to the amount of the principal and interest then due under the mortgage, and costs.

In re Kennedy's Estate, 32 I. L. T. R. 115, not followed.

QUESTION arising on allocation as to whether mortgagees who were paid their principal debt, and interest up to the date of payment, were also entitled to be paid an additional twelve months' interest in lieu of notice, under a proviso contained in their mortgage deed.

By indenture of mortgage dated the 3rd August, 1900, and made between M. E. C. Fortescue of the one part, and Count Arthur Moore and Thomas Leonard of the other part, the lands sold in this matter under the Land Purchase Acts were conveyed to Count Arthur Moore and Thomas Leonard to secure the sum of £44,000 and interest as therein mentioned. The deed contained a covenant for payment with interest on the 10th February, 1901, and a proviso for redemption and reconveyance upon such payment. The deed also contained a proviso that if interest was duly paid payment of the principal money thereby secured should not be required until the expiration of ten years from the date thereof, nor after the expiration of the said period without twelve months' notice requiring such payment; also a proviso that the mortgagor should not be at liberty to pay off the said principal sum, or any part thereof, before the expiration of ten years from the date thereof unless the mortgagees should be willing to receive the same earlier, nor to pay the same on or after the expiration of the said period without giving twelve months' notice of intention to do so; and further, a proviso that in the event of the mortgagees having (owing to a compulsory sale of the hereditaments thereby granted, or any part thereof, or otherwise) to accept payment of the said principal sum, or any part thereof, without having received twelve months' notice in writing of intention to pay the same, the mortgagees should be entitled to receive, together with any principal money paid to them, a sum equivalent to twelve months' interest after the rate of £4 per cent. per annum on

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the amount of such principal moneys, in addition to all interest then payable on principal moneys remaining due under the mortgage deed.

By indenture dated 15th June, 1904, the said mortgage was tranferred to Charles Moore and Charles William Clifford.

On the 11th July, 1907, M. E. C. Fortescue lodged an originating application with the Land Commission to carry out a sale of the said lands to his tenants. On the 17th December, 1909, notice in Form E prescribed by the Land Commission Rules was published in the *Dublin Gazette*, and at the same time a similar notice was sent to the mortgagees, who, on the 6th January, 1910, entered an appearance in the Land Commission matter. The mortgagees received notice of the proceedings from time to time up to the ruling of the final schedule in July, 1915, when they attended to prove their claim. In addition to the principal moneys due under their mortgage deed and interest up to date, they claimed to be entitled to an additional twelve months' interest in lieu of notice under the proviso therein contained.

Meredith K.C., for the mortgagees.
R. H. Macrory, for the vendor.

WYLIE J.:—

In this case mortgagees, who were paid at allocation their principal debt and interest up to date of payment, claim an additional twelve months' interest in lieu of notice under a proviso in the mortgage deed. The mortgage was dated the 3rd August, 1900, and contained a covenant for payment with interest on the 10th February, 1901, and a proviso for redemption and reconveyance upon such payment. There was also a proviso that the mortgagor should not be at liberty to pay off the principal money or any part thereof before the expiration of ten years from date, nor after the expiration of said period without giving twelve months' notice in writing of intention so to do. Then there was this further proviso upon which the claim for additional interest is based, that in the event of the mortgagees having (owing to a compulsory sale or otherwise) to accept payment without having received twelve months' notice in writing of intention to pay the same, the mortgagees should be entitled to receive a sum equivalent

to twelve months' interest in addition to the principal money and interest thereon payable under the mortgage.

Now there is no doubt that in the case of a sale under the Land Purchase Acts, both before and since the Act of 1903, a mortgagee upon the land sold was compellable to accept payment of his incumbrance, and the claim to additional interest would appear to be good unless the mortgagees have received due notice, or unless the proviso is invalid as a clog on redemption, or is rendered ineffective by sect. 24, sub-s. 6, of the Act of 1903. It seems to me the claim can be most easily disposed of on the ground of notice. I think the exact point was decided by Meredith J. in *In re Kennedy's Estate* (1). In that case the mortgage, dated February, 1897, contained an express covenant by the mortgagor that, in the event of his selling the lands to his tenants or otherwise, the mortgagor, before requiring the mortgagee to take payment, should give the mortgagee three calendar months' notice of his intention to pay. Proceedings for sale were commenced in April, 1897; the mortgagee was served with notice in the usual way, and entered an appearance on the 11th June, and got notice of the proceedings from time to time. On the ruling of the final schedule by the examiner, a claim was put forward by the mortgagee for interest up to the date of payment, and three months' additional interest in lieu of notice. The claim for additional interest was disallowed by the examiner, and came before the judge for his ruling; and Meredith J. decided that the course of proceedings in the Land Commission leading up to payment of incumbrances in all cases, whether the mortgage deed was silent as to notice or contained an express covenant to give notice, was sufficient notice.

In this case the mortgagor lodged an originating application to carry out a sale to his tenants on the 11th July, 1907. On the 17th December, 1909, notice in Form E was published in the *Dublin Gazette*, and a similar notice was at the same time sent to the mortgagees, who entered an appearance on the 6th January, 1910. They received notice of the proceedings from time to time up to the ruling of the final schedule in July, 1915, when they

(1) 32 I. L. T. R. 115.

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attended and proved their claim. They had, therefore, over five years' notice of intention to pay according to the course of the Court; and they received a subsequent notice fixing the very day on which payment would be made unless they were in default in proving their claim. The facts, therefore, bring the case clearly within the decision in *In re Kennedy's Estate* (1).

This question came again before Meredith J. in *In re Talbot's Estate* (2), where he considered it in connexion with sect. 24, sub-s. 6, of the Act of 1903, and where the payment was made within six months from the date of the filing of the originating application; and notwithstanding an express covenant in the mortgage requiring six months' notice, the learned judge held that interest could only be claimed up to the day of payment.

Counsel for the mortgagees in support of their claim referred to my own decision in *In re Armstrong's Estate* (3), and seemed to suggest that it was inconsistent with *In re Talbot's Estate* (2). In my opinion there is no inconsistency. I certainly had no intention of casting any doubt upon the correctness of the decision in *In re Talbot's Estate* (2). In *In re Armstrong's Estate* (3) the question was not one of notice, or interest in lieu of notice. The covenant there expressly provided for payment off at allocation of the purchase-money, if it occurred within five years, and defined the mortgagee's rights in that event; and the mortgagee's claim was in accordance with the rights so agreed upon. There was neither "direction, proviso, nor covenant contrary to payment off" at allocation, and therefore it seemed to me that sect. 24, sub-s. 6, did not apply. I could not allow this claim for additional interest without overruling decided cases.

I may add that this is a stronger case against the claim than *In re Talbot's Estate* (2), for there the payment was made within six months of the first notice of the proceedings, whereas here it was not made till five years after the claimant had full notice of the intention to pay, so that the proviso relied upon would in terms appear not to apply.

I, therefore, disallow the claim.

J. E. W.

(1) 32 I. L. T. R. 115. (2) 38 I. L. T. R. 211. (3) 46 I. L. T. R. 46.

The mortgagees appealed to the Court of Appeal (1).

Meredith K.C. and *Poole*, for the appellants :—

We contend that under the express terms of the covenant the appellants are entitled to twelve months' interest in lieu of notice. *In re Kennedy's Estate* (2) was wrongly decided. Meredith J., when he held in that case that the course of proceedings for sale in the Land Commission was sufficient notice under a covenant in a mortgage deed to give three months' notice of intention to pay, misconceived the decision of the Incumbered Estates Court in *In re Lighton's Estate* (3). The latter case dealt solely with the so-called common law right of a mortgagee to notice of intention to pay, not with the effect of an express covenant, with which the common law right is not co-extensive. As to the nature and extent of the common law right: see *Browne* v. *Lockhart* (4) and *Fitzgerald's Trustee* v. *Mellersh* (5). *Keily's Estate* (6) shows the effect of an express covenant. In any case there was no such covenant as the present one in *Kennedy's Estate* (2), where the judge may have thought proper to leave the mortgagee to enforce what right he had in a common law action for breach of covenant. Further, it was open to the parties in this transaction to contract out of the practice laid down in *Kennedy's Estate* (2), and they have done so: *Ferguson* v. *Bradstreet* (7).

Section 24, sub-s. 6, of the Irish Land Act, 1903, will be relied on, but has no application to the present case. That section has reference to cases such as *In re Hone* (8), where it was held that a covenant in a mortgage deed not to redeem for a fixed period which had not expired, was cause against making absolute an order for sale in the Landed Estates Court. Sect 24, sub-s. 6, was never intended to relieve a mortgagor from his bargain. *Talbot's Estate* (9) was also wrongly decided, but may be distinguished on like grounds as *Kennedy's Estate* (2).

It cannot be contended that the bargain amounted to a clog on

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN L.C., and RONAN and MOLONY L.JJ.

(2) 32 I. L. T. R. 115.
(3) 4 Ir. Jur. 35.
(4) 10 Sim. 420, at p. 424.
(5) [1893] 1 Ch. 385.
(6) 6 Ir. Jur. N. S. 184.
(7) 22 L. R. Ir. 303.
(8) I. R. 8 Eq. 65.
(9) 38 I. L. T. R. 211.

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the equity of redemption. It is not unfair and unconscionable, nor in the nature of a penalty clogging the equity of redemption, nor inconsistent with nor repugnant to the contractual or equitable right to redeem: *Kreglinger* v. *New Patagonia Meat and Cold Storage Co., Ltd.* (1); *Biggs* v. *Hoddinott* (2); *Dunlop Pneumatic Tyre Co., Ltd.* v. *New Garage and Motor Co., Ltd.* (3); *Webster* v. *Bosanquet* (4).

Herbert Wilson K.C. and *Macrory*, for the respondent:—

The appellant's claim is, that they should be paid, in addition to the amount of their principal, interest, and costs, an additional full year's interest in lieu of notice; but they have had full notice in the Land Commission proceedings. The final notice to incumbrancers was served more than twelve months prior to the distribution of the purchase-money. Therefore nothing has occurred to make the covenant in question effective. It is settled practice that the proceedings in the Land Commission are themselves sufficient notice: *Lighton's Estate* (5); *Kennedy's Estate* (6); *Talbot's Estate* (7). In *Lighton's Estate* (5) the sole question was whether the mortgagee had notice of the intention to pay him off. Richards B. held that the proceedings were substantially notice to all parties. "It is then," he says, "the duty of the mortgagee to look out for a new investment." That decision is equally applicable to the case of an express covenant, as to one where the common law right to six months' notice is in question. Here the mortgagees had more than twelve months to look out for a new investment. The claim is contrary to the clear policy and aim of the Legislature, which were to facilitate sales to the occupying tenants, and an incumbrancer availing himself of the Act of 1903 should not be penalized. Thus, in *Blennerhasset's Estate* (8) it was held that a sale of incumbered land under this Act by the owner was not analogous to a redemption suit, and that the incumbrancer, being compulsorily paid off, could not accordingly claim more than six years' arrears of interest accrued prior to the payment of the purchase-money into the Bank of Ireland.

(1) [1914] A. C. 25.
(2) [1898] 2 Ch. 307.
(3) [1915] A. C. 79.
(4) [1912] A. C. 394.
(5) 4 Ir. Jur. 35.
(6) 32 I. L. T. R. 115.
(7) 38 I. L. T. R. 211.
(8) [1911] 1 I. R. 16.

The respondent should not therefore be treated as if having come forward to redeem.

We rely on sect. 24, sub-s. 6, of the Act of 1903, which applies in the widest terms to all cases. The Land Commission is to distribute the purchase-money "as soon as practicable," and all charges and incumbrances must be paid off "notwithstanding any direction, proviso, or covenant to the contrary contained in any instrument." That has been done in the present case.

We further say that the provision amounts to a clog on the equity of redemption, and should not be enforced by this Court: *Morgan* v. *Jeffreys* (1); *Fairclough* v. *Swan Brewery Co., Ltd.* (2); *Thompson* v. *Hudson* (3); *Smith* v. *Smith* (4).

Meredith K.C., in reply.

Cur. adv. vult.

Feb. 28.

The judgment of the Court was delivered by RONAN L.J.

There is involved in this case not only the substantial sum of £1600, but also a question of law of great importance in the administration of the Land Purchase Acts. Under these circumstances we thought it right to point out to the parties that unless the provisions of sect. 71 of the Act of 1903 were put in force there could be no appeal to the House of Lords, and offered to let the case stand over to enable them to take steps to have this done.

In the *Blennerhasset Case* (5) the members of the House of Lords commented strongly on this course not having been taken. However, the parties decided not to take this course, so we must dispose of the case as it stands.

The facts of this case are stated in the judgment of Wylie J. The following additional particulars, however, are material:—The mortgage was for £44,000. The rate of interest was 4½ per cent., reducible to 4 per cent. if paid within 60 days. In addition to the proviso that the mortgagor should not be at liberty to pay off the mortgage, there was a proviso that the mortgagee should not, if interest were paid within 60 days, require payment of the

(1) [1910] 1 Ch. 620.
(2) [1912] A. C. 565.
(3) L. R. 4 H. L. 1.
(4) [1891] 3 Ch. 550.
(5) [1912] A. C. 281.

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principal for ten years, or after that period without twelve months' notice.

The first question for consideration is whether, as between the parties to the deed, these are valid and binding clauses, or whether they are inequitable, and such that a Court of Equity would not enforce, or unlawful on any other ground.

These mutual clauses against paying off or deferring payment before ten years, or afterwards without twelve months' notice, are absolute contracts that must be observed. The ordinary expression, six months' notice or six months' interest, is misleading. The right of the mortgagee is to refuse to accept payment of the principal until the time fixed by the deed.

In practice of course a man will always prefer to take his principal and six months' interest on the 1st of January rather than wait to get the same amount on the 1st of June. But the contract is not one for the payment of money at all. It simply provides that the principal shall only be paid at a certain time. The parties may agree for payment at any other time on such terms as they please; but there is no provision in the deed for any alternative of paying off at a different time on any terms. These clauses remain in full force so long as the contract remains unaffected by any cause which interferes with the duty and power of the parties to carry out its terms.

However, this contract might be prematurely determined by the exercise of statutory powers of acquisition or sale of the lands, and the necessary immediate payment off of the mortgage. The final clause in the present deed is a contract to provide for such an event as this. It is a separate and wholly distinct contract from the mutual clauses. It is not based on a breach of those contracts. On the contrary, it contemplates the payment off by force of a vis major, which negatives the idea of a breach of contract. It provides for a vis major preventing the parties carrying out the contract, and is a special separate contract as to what is to happen in that event. It is a separate independent contract, providing for a single event. It is a stipulation as to what should be paid on breach by the mortgagor of the antecedent contract, and the doctrine of penalty and liquidated damages has no application to it. It is no more a penalty than

it is liquidated damages. It has nothing to say to any breach of contract. Even if there were a question of penalty or liquidated damages, the money payable under this clause could not be held to be a penalty. See *Webster* v. *Bosanquet* (1), and *Dunlop Pneumatic Tyre Co., Ltd.* v. *New Garage and Motor Co., Ltd.* (2). It is with this final clause, and this alone, that we have to deal in the present case. This disposes of the question of penalty.

At to the question of repugnancy, every conveyancer knows that the ordinary form used in a mortgage deed, where it is desired to increase the interest if not paid punctually, is to make the covenant for payment at the higher rate, and add a proviso that if made within a limited term the lower rate shall be accepted, and that a similar course is adopted where it is desired to postpone the period of payment. The covenant for payment and proviso for redemption, specifying six months from the date of the deed, are inserted, and the proviso then contains the stipulations limiting the operation of the covenant and proviso for redemption.

It was seriously argued that in the latter case the provisoes are *repugnant* to the proviso for redemption, and wholly void on the simple ground of repugnancy. I referred to Davidson. Mr. Meredith referred us to Key and Elphinstone and Prideaux as to the settled form. It is difficult to find an authority for a uniform universal settled practice. However, in *Biggs* v. *Hoddinott* (3) the proviso is stated thus (p. 308):—"That, notwithstanding the proviso for redemption, the defendants should not be entitled to require or compel the plaintiff to receive his principal before the expiration of five years from the date of the deed." The case was argued before Romer J. and the Court of Appeal as to whether this clause could be enforced under the circumstances of the case; but no one ever suggested repugnancy. The "notwithstanding" calls attention to the apparent inconsistency. I, therefore, think there is nothing in this point of repugnancy in the terms of the deed. There is no other repugnancy. It is important, however, to notice that (at p. 314)

(1) [1912] A. C. 394. (2) [1915] A. C. 79, at pp. 86, 87, 88.
(3) [1898] 2 Ch. 307.

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Romer J. expressly refers to "the time agreed upon between the parties for redemption;" i.e. as the date on which the question of clog was to be considered; i.e. the term fixed by the proviso.

A clause preventing redemption for a specified period may be unconscionable and oppressive, but it only alters the *date* of redemption; it does not vary the terms of redemption whenever the time comes. If the interest was 50 per cent., a clause that the mortgage should not be paid off for twenty years would be clearly oppressive, and equally so if the twenty years were in the original proviso for redemption, instead of in a subsequent proviso.

What I may call the question of the equitable merits of the bargain carried out by a deed of mortgage does not depend on the form of the deed; it depends on the substance. What is the substance of the transaction in the present case? The mortgagee is applied to for a loan of £44,000, at 4½ per cent., reducible to 4 per cent. He says, "I want a permanent investment. I will not call in the money for ten years, or, after that, without giving you a year's notice, to enable you to look about for another lender; but, on the other hand, you must agree not to pay off the loan except on the same terms, so that I also may have a fixed investment for ten years, and then have time to have other mortgagors ready to execute their mortgages, title approved, &c., when you pay me the money. I do not think I could safely take less than twelve months to protect myself from the risk of having my money idle." To say that such terms are "unconscionable" is, in the words of Lindley L.J., in *Biggs* v. *Hoddinott* (1), "asking us to lay down a proposition which would shock any business man." What remains? The mortgagee adds:—"The law is in a queer state in Ireland, and changes are plainly coming. If I am forced to take my money by compulsory sale, or otherwise, during the ten years, I suppose I must put up with it; but at all events, if it happens that I have to take it without twelve months' notice, you must give me twelve months' interest. I will not lend the money without this stipulation." Is there anything unconscionable in this?

(1) [1898] 2 Ch. 307, at p. 321.

Speaking of statements of the law in former cases, Lord Parker says in *Kreglinger's Case* (1):—"It is little wonder that, with the existence in the authorities of so many contradictory theories, persons desiring to repudiate a fair and reasonable bargain have attempted to obtain the assistance of the Court in that behalf. . . . It is satisfactory to find, as I have found on analysing the cases in question, that no such attempt has yet been successful. In every case in which a stipulation by a mortgagee for a collateral advantage has, since the repeal of the usury laws, been held invalid, the stipulation has been open to objection either—1, because it was unconscionable; or 2, because it was in the nature of a penal clause clogging the equity arising on failure to exercise a contractual right to redeem; or 3, because it was in the nature of a condition repugnant as well to the contractual as to the equitable right."

The main question is whether the deed on the whole or any particular part is unconscionable. The ten years' clause ceased to have any operation after the 3rd August, 1910, but I shall take it into account in considering the general nature of the deed, although, strictly speaking, it does not now affect the only clauses with which we have to deal.

In *Lawless* v. *Mansfield* (2) the rate of interest was 5½ per cent., reducible to 5. There were provisions that the mortgagor should not pay off, or the mortgagee require payment, for five years. At p. 598 Lord St. Leonards said: "That arrangement was for the benefit of both parties: the lender obtained a continuing security for his money for five years; and the borrower, on the other hand, was sure that he would not be compelled every six months, perhaps, to look out for a new lender, and to incur the expense attendant upon a new loan. It was a fair stipulation: it was valuable on both sides." There the mortgage was for £12,000, interest 5½ per cent., reducible to 5. Here £44,000, and the interest only 4½, reducible to 4. In *Biggs* v. *Hoddinott* (3) the term was five years. Romer J. said: "I am of opinion that it is obviously to the advantage of both the mortgagor

(1) [1914] A. C. 25, at p. 56.
(2) (1841) 1 Dr. & W. 557.
(3) [1898] 2 Ch. 307.

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and mortgagee that such a provision should be enforced. Of course, that does not prevent the Court in a proper case from preventing the application of the clause if it is too large, or there are circumstances . . . which render it in the opinion of the Court unreasonable or oppressive." In *Hone's Case* (1) the term was five years. In *Teevan* v. *Smith* (2) Jessel M.R. mentions five or seven years.

In *Cowdry* v. *Day* (3) and *Morgan* v. *Jeffreys* (4) the proviso was held not enforceable. The former case was a mortgage to a solicitor by his client prepared by the former. The period was twenty years. The Vice-Chancellor held it void, but said he gave no opinion as to how he would have decided the case if it had not been one between solicitor and client. In the latter case the period was twenty-eight years. Joyce J. held the clause void, but relied strongly on the fact that there was no corresponding clause on the part of the mortgagee not to call in the money, and the fact that there was a power of sale without notice. Even in this case Joyce J. said, "It is very difficult to draw the line." He was a conveyancer of great experience and knowledge, and he quotes the statement of Davidson: "It is usually intended that both parties (mortgagee as well as mortgagor) shall be entitled to require the money to remain on the security during the stipulated time." I think there can be no doubt on reading his whole judgment that he would have held the mutual ten years' clauses in the present deed reasonable and proper, and also the twelve months' notice clause, and the final clause.

Sections 108 and 114 of the Lands Clauses Act are important on this question of reasonableness. They show that in the case of compulsory purchase the Legislature thought it reasonable, in the absence of any provision in the mortgage, that, notwithstanding the notice given by the elaborate advertisements and the time taken in the proceedings, an incumbrancer should, when ultimately paid, get, in addition to his principal and interest up to date, six months' additional interest. They further show that it was thought reasonable that when the mortgagee was being paid off contrary to the provisions of his deed, he should be properly compensated for this.

(1) I. R. 8 Eq. 65.
(2) 20 Ch. D. 724.
(3) 1 Giff. 316.
(4) [1910] 1 Ch. 620.

I am, for all these reasons, of opinion that as between the mortgagor and mortgagee all the provisions of the mortgage deed are lawful provisions; and that, apart from statute, they are provisions to which the Courts are bound to give full effect.

The question in this case is entirely one of the amount of the mortgagee's claim under the lawful provisions of his mortgage. There is no question raised as to the date at which the Land Commission is entitled to pay the claim off. The particular contract involved in the final clause is that the claim in a *certain event* is to be principal, interest, and costs up to date, plus twelve months' interest. If this particular contract is a valid contract, the only question would appear to be whether the "certain event" had happened.

Mr. Justice Wylie thought he was bound by authority to hold that it had not. The cases to which he referred were not cases on contract similar to that in the final clause, but cases on clauses similar to the prior clauses in the present deed providing that payment should not be made before a specified time, or without a specified notice. I must deal with this subject at some length.

Mr. Justice Wylie in his judgment says:—"Now there is no doubt that in the case of a sale under the Purchase Acts, both before and since the Act of 1903, a mortgagee upon the land sold was compellable to accept payment of his incumbrance." I am not aware that prior to the Act of 1903 the Land Commission had any powers over incumbrancers greater than those of the Landed Estates Court in similar cases. The Incumbered Estates Court Act and the Landed Estates Court Act deal expressly with cases where the mortgage deed expressly provides that the mortgage shall not be paid off before a certain date. The last clause of sect. 23 of the Incumbered Estates Court Act shows that the Court had no power to compel a mortgagee to accept payment during the period covered by such a clause. It says:—"Where such land . . . is subject to any incumbrance under the terms of which the incumbrancer cannot be required to accept payment of the principal sum before the expiration of a term of years unexpired, such sale may be made if the Commissioners think fit, subject to such incumbrance."

The last clause but one of sect. 54 of the Landed Estates

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Court Act is in identical terms. In *In re Burke* (1) Hargreave J. thought that such a clause was not *cause* against a conditional order for sale, but that the mortgagee should come in on the settlement of the rental. He says: "If the Court sells discharged from the mortgage, the only effect will be to change the nature of security by turning the lands into money, and surely the purchase-money, £2700, is a sufficient security for £1500, the amount of the mortgage. If we sell now, the matter will not be in a position to admit of the payment of your mortgage before June. *You may, then, insist on six months' notice of payment,* pursuant to the covenant in your deed, and the Court can retain the money for you." The report states that the date of the deed was the 26th June, 1856; the date fixed for payment, the 26th June, 1861 (a five-year clause); and the deed contained, in addition, a covenant that the mortgagee should not be compelled to accept payment without six months' previous notice. The matter arose on a motion by the owner to sell *part* of the lands on a private offer of £2700. The order was to accept the offer without prejudice to the rights of the mortgagee against the fund to insist on delay of payment and six months' notice.

In the subsequent case of *Re Hone's Estate* (2) Flanagan J. went further, and held that such a claim is cause against a conditional order for sale, discharged from the mortgage, obtained by the mortgagor. In *Burke's Case* (1) the petitioner was a puisne incumbrancer.

The right of the mortgagee under the clause in this deed I have been dealing with was to have his £44,000 and interest remain a charge on the lands until the 3rd August, 1910, and until he got twelve months' notice of intention to pay it off, and was paid off pursuant to such notice. *In re Burke* (1) shows that in the Landed Estates Court, if a sale were made, those rights would be transferred to the purchase-money; *Hone's Estate* (2), that even this could not be done against his will. It was never suggested that the contractual rights of the mortgagee were destroyed; the utmost was that they were transferred to the purchase-money. *Hone's Estate* (2), which has never been

(1) 7 Ir. Jur. N. S. 35. (2) I. R. 8 Eq. 65.

questioned, shows that the Landed Estates Court would not even do this. *Hone's Estate* (1) and *Burke's Estate* (2) are referred to as authorities in the last edition of Madden's Landed Estates Court Practice.

These sections and cases show plainly that the Landed Estates Court had not the power referred to by Wylie J. Speaking for myself, I am not aware that prior to the Act of 1903 the Land Commission had any such power. As far as I know, their power as to incumbrances was no greater than that of the Landed Estates Court. Indeed, their original jurisdiction was given by applying to the Land Commission certain sections of the Landed Estates Court Act. They had under their own Acts extensive powers of dealing with superior interests, but these did not extend to incumbrances; and I am not aware they had any jurisdiction to deprive a creditor of any of his rights under his security, though such rights were converted into rights against the purchase-money, as stated by Hargreave J., in *Burke's Estate* (2). It appears to me that the object of the final clause of sect. 24, sub-s. 6, was to give them this very power of compelling a mortgagee to accept payment at a time prior to that agreed on between the parties to the mortgage and specified in it. The strongest proof of this is the clause itself. If they had the power before, it would be simply inoperative.

I am equally clear that it gave the Land Commission no power to deprive the mortgagee of any portion of what was secured to him by his mortgage, or to relieve the mortgagor from any payment he was bound to make under it.

Sect. 24, sub-s. 6, says nothing about the terms on which the Land Commission may pay off the mortgage. It gives no power to pay it off under any terms save those of the mortgage itself, except as to the time of payment off. We have not to consider here whether if the payment was made during the ten years, compensation would be payable. We have not to consider even whether the clause against paying off without notice gives any right to compensation, and we need not express any opinion on these questions. What we have to deal with is, the express provision that if the mortgagee is compelled to accept payment without

(1) I. R. 8 Eq. 65. (2) 7 Ir. Jur. N. S. 35.

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twelve months' notice, he is to get a sum equal to twelve months' interest. The case of the respondent is, that he is so compelled. I can find nothing in sect. 24, sub-s. 6, to avoid this specific contract, or to entitle the Land Commission to pay off the mortgage without paying the money thereby contracted to be paid and secured on the lands in the event which has happened.

The only case of such an express contract to which we have been referred is Mr. Justice Wylie's decision in *Armstrong's Estate* (1), referred to in his judgment in the present case. In that case, there was an express agreement to pay a specified sum for interest in the event of the mortgagee being required to accept payment before a specified time. There the mortgage was apparently dated the 27th March, 1909. The mortgagor covenanted not to pay off or to take any step to compel the mortgagee to take payment for five years from that date, unless sales to tenants through the Land Commission were previously completed, and the purchase-money ready for allocation, in which event he should pay to the mortgagee differential interest for the residue of the five years *after date of payment* at 15*s.* per cent. per annum. This event had occurred, and the allocation was taking place in December, 1911. The five years would not expire until the 27th March, 1914. There were over two years unexpired. Wylie J. held that the mortgagee was entitled to prove at the allocation for 15*s.* per cent. for this period, that is, in addition to his principal, interest, and costs up to date of payment. This appears to us an express decision that sect. 24, sub-s. 6, does not in any way affect the claim of the mortgagee under the final clause in this case. It is quite in accordance with our views of this section. As Wylie J. says: "The covenant there expressly provided for payment off at allocation of the purchase-money." (Here it provided for payment off by a compulsory sale or otherwise without notice.) "And it defined the mortgagee's rights in that event." (Viz., 15*s.* per cent. interest for the residue of five years; here twelve months' interest.) "And the mortgagee's claim was in accordance with the rights so agreed on. There was neither direction, proviso, nor covenant against paying off." Every word of this applies equally to the final clause in the present deed,

(1) 46 I. L. T. R. 46.

and we agree with it. Accordingly, Wylie J. says in the earlier part of his judgment: "The claim to additional interest would appear to be good, unless (*a*) the mortgagees have received due notice, or (*b*) unless the proviso is invalid as a clog, or (*c*) is rendered ineffective by sect. 24, sub-s. 6." He does not suggest that it is bad on either of the two latter grounds. Indeed, he could not have done so without overruling his own decision in *Armstrong's Case* (1). He decides the case (solely on the authority of *Kennedy's Case* (2) and *Talbot's Case* (3), by which he thought he was bound) on the ground that the proceedings were "due notice," he does not say "twelve months' notice," to the mortgagee.

This is, therefore, the only question in the case: On the true construction of the final clause in this deed, did "the event" provided for happen? Had the appellant "to accept payment without having received twelve months' *notice in writing of intention* to pay the same"?

The idea that a petition in the Landed Estates Court or a proceeding for sale in the Land Commission is a notice of payment within the meaning of a clause of this nature in a mortgage is really absurd. The object of this notice is that the mortgagee may know the day he is to get his money, so that he may have another mortgagor ready to take it on that day. This is shown by the rule that if the mortgagor fails to pay on the very day, the mortgagee is entitled to a fresh notice for the full period. The institution of the proceedings really only tells him this: If these proceedings are carried through to a sale, you will be paid off at some time within the next two or three, or four or five, years. Suppose a notice served in these terms:—"This mortgage may (or will) be paid off some time in the course of the next few years." Could anyone seriously suggest that this would be a twelve months' notice within the meaning of the final clause?

I must repeat this is the real question. It is not a question of the right to pay off without notice; not a question of damages for breach of contract to give notice. The question is: "Did the appellants receive twelve months' notice in writing of intention to

(1) 46 I. L. T. R. 46.
(2) 32 I. L. T. R. 115.
(3) 38 I. L. T. R. 211.

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pay the same?" If they did not, there is an express valid contract to pay them twelve months' interest. In this case the alleged notice is supposed to have been given five years before the time of payment. In the absence of authority, it would seem to me simply absurd to hold that the twelve months' notice mentioned in the clause was given.

How do the authorities stand?

1. There is no case of a contract to pay a certain sum in case a certain notice is not given.

2. *Keily's Estate* (1) (decided in 1861) and *Burke's Estate* (2) (already referred to, decided in 1862) were cases of express clauses that the mortgage-money was not to be paid off without a certain notice. There was no such clause in either as the final clause in this case.

But *Keily's Case* (1) decided, and *Burke's Case* (2) necessarily implied, that even in these cases the money could not be paid off without the prescribed notice, and that the proceedings were not the notice contracted for.

3. Ten years before came *Lighton's Estate* (3), a case in which there was no contract of any kind as regards notice. The head-note states the effect of the case—(*a*) "Where funds are realized by a sale under this Court (the Incumbered Estates Court), the mortgagee is not entitled to insist upon his common law right to receive a six months' notice." (*b*) "*Semble*, the proceedings under this Court will be considered to constitute such notice": (*a*) has no application to a case of express contract, and we express no opinion on it, (*b*) is based on a dictum of Richards B., referring to a decree for redemption. The other two judges expressed no opinion on the point. One of them was Mr. Commissioner Longfield, the judge who decided *Keily's Estate* (1); the other, Mr. Commissioner Hargreave, who gave the judgment in *Burke's Estate* (2). These cases show that in 1851 and 1852 there was no foundation for the *semble*, in cases of express contract. They were decided over fifty years ago. There is no reason to believe that the practice therein recognized and acted on in the case of express contracts has ever been varied.

(1) 6 Ir. Jur. N. S. 184.
(2) 7 Ir. Jur. N. S. 35.
(3) (1851) 4 Ir. Jur. 35.

In this state of the authorities *Kennedy's Estate* (1) came before Meredith J. In *Kennedy's Estate* (1) there was an express covenant by the mortgagor that, "in the event of his selling the lands to the tenants or otherwise," the mortgagor before requiring the mortgagee to take payment of the purchase-money should give the mortgagee three months' notice of his intention to pay. There was no contract to pay any sum for interest or otherwise. The only claim possible would be one for damages for breach of this agreement, or compensation for premature payment. Meredith J. apparently followed the dictum in *Lighton's Case* (2) in preference to *Keily's Case* (3). No other authority was cited. No reasons are given for this decision except that "the course of the proceedings were sufficient notice."

It will be observed that in *Talbot's Estate* (4) there is not a word in the judgment about the proceedings being notice. This is probably owing to the fact that the judge's attention had been called to *Keily's Case* (3). This had not been brought to his notice in *Kennedy's Case* (1). In neither case was his attention called either to *Burke's Estate* (5) or *Hone's Estate* (6).

Talbot's Case (4) is certainly based on sect. 24, sub-s. 6, unless the early part of the judgment can be taken as an adoption of *Kennedy's Estate* (1). I have dealt with it at length, as there are reasons given for the decision. *Kennedy's Case* (1) is more difficult to deal with, as there are no reasons for the decision.

It is difficult to see what effect Meredith J. attributed to sect. 24 in *Talbot's Estate* (4), having regard to his previous decision in *Kennedy's Case* (1) that the mortgagee was not entitled to any additional payment by reason of the payment without the prescribed notice. The decision in *Talbot's Case* (4) may possibly be supported on the ground that the only claim that could be made would be for damages for breach of contract not to pay off, but that as the payment was the result of vis major there was no breach of contract, and there was no contract for any extra payment on the event which happened. The case is, at the utmost, an authority for the proposition that in *the absence of*

(1) 32 I. L. T. R. 115.
(2) [1851] 4 Ir. Jur. 35.
(3) 6 Ir. Jur. N. S. 184.
(4) 38 I. L. T. R. 211.
(5) 7 Ir. Jur. N. S. 35.
(6) I. R. 8 Eq. 65.

Appeal. 1916. *In re* FORTESCUE'S ESTATE. Ronan L.J.

express contract, payment off of a mortgage requiring notice of payment, without such notice, gives no claim for compensation for the absence of notice, where the absence of the notice is not a breach of contract by the mortgagor.

It is difficult to follow the judgment; it is based to a great extent on the interest of the public, *i.e.*, the tax-payer. I must say I wholly fail to see what interest the public have in the way the purchase-money is divided between the mortgagor and mortgagee. They have an interest in the date, not in the mode of distribution. The judge says, "When the amount of the claim is ascertained . . . the incumbrancer is to be paid off." Certainly; but this has nothing to say to the amount of the claim. The entire judgment seems to overlook the fact that the question is one between the mortgagor and mortgagee, in which the public have no interest, and that there is no question at all as to the date of distribution.

Talbot's Estate (1) was a simple case where the money was not to be paid off without six months' notice. It was paid off within less than six months of the institution of the proceedings. There was, therefore, no pretence of there being six months' notice of any kind. It turned entirely on the effect of sect. 24, sub-s. 6. Meredith J. of course did not decide that less than six months' notice was six months' notice, but he held that the clause requiring notice did not prevent the payment off at once of the mortgage or entitle the mortgagee to any compensation for default of notice, having regard to sect. 24, sub-s. 6.

The appeal must be allowed.

Solicitor for the appellants: *A. O'Hagan & Sons.*
Solicitor for the respondent: *Charles MacMahon.*

R. ST. J. C.

(1) 38 I. L. T. R. 211.

IN RE KIERAN.

MATTHEWS *v.* KIERAN.

(1916. No. 1062.)

Pim J.
(for Barton J.)
1916.
Feb. 14, 28.

Will—Construction—Power of Appointment—Selection—Trust—Power to appoint to one of a Class—Non-exercise of Power—Implied Trust for Class—Power engrafted on Trust.

By his will a testator devised and bequeathed his farm of land held under a tenancy from year to year, his cattle, stock, &c., and the rest of his property, to his brother O. K. in trust for J. (eldest son of O. K.) until he attained 21, to be given over to him at that age if O. K. considered his conduct deserving of same. In the event of J. dying before 21, or O. K. deeming him undeserving of the bequest, the will provided as follows:—"Then I direct my said trustee to hold said farm of land and all other goods and chattels of every kind whatsoever upon trust for such other son of my said brother O. K. as my said brother shall appoint." J. died before attaining the age of 21. O. K. died without appointing to any son of his, and left three sons surviving him.

Held, that the three surviving sons of O. K. were entitled to the farm and other assets of the testator in equal shares as tenants in common.

ORIGINATING SUMMONS.

By his will, dated the 23rd March, 1876, Christopher Kieran, farmer, of Tenure, county Louth, provided as follows:—"I give devise and bequeath my farm of land in Tenure and all my estate and interest therein and all my cattle, farming-stock and implements of husbandry and all other property whatsoever of which I may die seized or possessed unto my brother Owen Kieran of Kieran's Cross upon trust for his son John Kieran until he shall attain his full age of twenty-one years when I will and direct said farm of land, cattle, farming-stock and cetera to be given over to my said nephew John Kieran provided his father the said Owen Kieran shall consider his conduct deserving the same, but in the event of the death of my said nephew John Kieran before he shall attain the age of twenty-one years or of his father deeming him undeserving of said bequest then I direct my said trustee

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to hold said farm of land and all other goods and chattels of every kind whatsoever upon trust for such other son of my said brother Owen Kieran as my said brother shall appoint. I hereby appoint my said brother Owen Kieran trustee and sole executor of this my will and manager of said farm until same shall become vested in his son as aforesaid."

Christopher Kieran died on the 11th December, 1883, without having altered or revoked his will. He was tenant from year to year of the farm of Tenure. He left no real estate.

John Kieran died on the 29th April, 1889, without having attained the age of twenty-one years.

The next-of-kin of the testator, Christopher Kieran, at the date of his death were his two brothers, Owen Kieran and Michael Kieran.

Michael Kieran died on the 9th of October, 1900, a bachelor and intestate.

Owen Kieran had four sons and no more—John Kieran, who died as already stated in 1889, and James Kieran, Patrick Kieran, and Michael Joseph Kieran, the defendants in the present summons. Owen Kieran died on the 26th May, 1915, without exercising the power of appointment contained in the testator's will, and having by his will purported to bequeath the farm of Tenure to the plaintiff Catherine Bellew, who was one of his daughters.

Bernard Matthews, the other plaintiff, was the legal personal representative of Owen Kieran.

On the 10th December, 1915, an originating summons was issued, asking for the determination of the following questions:—

1. Did the defendants take an absolute interest as tenants in common in equal shares under the will of Christopher Kieran in the lands of Tenure and the residuary personal estate of the said Christopher Kieran in the event of the death of their brother John Kieran under the age of twenty-one years and default of appointment by the said Owen Kieran?

2. Did the next-of-kin, according to the Statutes of Distribution of the effects of intestates, of the said Christopher Kieran take an absolute interest in the said lands and property in the events aforesaid?

Poole for the plaintiffs:—

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By the will a power of appointment is given to Owen Kieran authorizing him, in the event that happened, to select one of his sons as appointee of testator's estate. There is no defined intention shown in favour of the sons as a class. On the contrary, the power authorizes a gift to one only. *Inclusio unius exclusio alterius.* The terms of the will are very precise. The words are these:—"For such other son as my said brother shall appoint." These words clearly compel an exclusive appointment to one son only. If Owen had appointed to more sons than one, such appointment would have been void: Farwell on Powers (3rd ed.), p. 417; *per* Lord Alvanley in *Brown* v. *Higgs* (1); Sugden on Powers, p. 448. See also *Richardson* v. *Chapman* (2) referred to in Lewin on Trusts (12th ed.), pp. 1084, 1085, and *Moseley* v. *Moseley* (3).

A natural desire is manifested by the testator that his farm in Tenure, held under tenancy from year to year, should go to and be worked by one nephew, who should be industrious and capable. It is to go to the eldest first, if his conduct is satisfactory; and if not, or if he should die early, then to such other son of his brother Owen as the latter should choose. Such power of choice rests on a totally different basis from a power of distribution among members of a group or class, in which case, in default of the exercise of the power, the Court carries out the implied trust by distributing the subject-matter equally among the objects of the power: Sugden on Powers (8th ed.), p. 593; *Harding* v. *Glyn* (4).

In *Brown* v. *Higgs* (1) the words were:—"To one of the sons of my nephew Samuel Brown as the said John Brown shall direct by a conveyance in his lifetime or by his will." And the opinion of Lord Alvanley was, that there was a mere power given to John Brown, and that no trust was created. That case was re-heard before Lord Eldon (5), and at p. 566 of the report he refers to Lord Alvanley's opinion. See also Lewin on Trusts (12th ed.), p. 1085, note. It is a contradiction in terms to

(1) 4 Ves. 708; 5 Ves. 495; 8 Ves. 561. (2) 7 Bro. P. C. 318.
(3) Rep. *temp.* Finch, 53. (4) 1 Atk. 469; 2 Wh. & Tud., L. C. 339.
(5) 8 Ves. 561.

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say that a power to appoint property to one son, in default of the exercise of the power, creates a trust in favour of three sons. The only trust which can be possibly spelled out of this will is a trust in favour of one son only, and the Court will not now make such selection.

In *Sinnott* v. *Walsh* (1) there was power given to a donee to appoint to "whatever existing member of my family he may be disposed to will it to," and no doubt it was there held that, in default of the exercise of the power, there was an implied gift to all the objects of the power in equal shares; but the *ratio decidendi* of the case was that the words "whatever existing member of my family," were used as *nomen collectivum* authorizing an appointment to one or more of the objects of the power, and the observations of Ball C., at p. 32 of the report, show clearly that if the power had been one obliging the donee to select one single person as appointee he would have decided the case differently. See also Jarman on Wills (6th ed.), p. 651, and *Brook* v. *Brook* (2). *Moore* v. *Ffolliot* (3) was a case where the objects of the power were definite, and the power was only to appoint the proportions in which each of the objects was to take without excluding any. "The power, therefore," Porter M.R. says, "must be understood as tacitly including a provision for an equal sub-division of the fund amongst the objects, in the event of no appointment being made." That was the ground of the decision, which is therefore the converse of the present case. In the result the next-of-kin at the date of testator's death are entitled to his estate.

Carrigan K.C., for the defendants:—

In this case the power of appointment given by testator to his brother Owen Kieran is coupled with an express trust which he is required as a duty to execute. There is a trust created and a duty imposed on him. Then in default of appointment by him, there being no gift over, there arises an implied trust in favour of a defined class, *i.e.*, his three sons, the presumption being that the testator did not intend or desire that the objects of the power should be disappointed of his bounty by reason of the non-exercise of the power by the donee. Each son of Owen was a contingent beneficiary, and under the circumstances testator's will

(1) 5 L. R. Ir. 27. (2) 3 Sm. & G. 280. (3) 19 L. R. Ir. 499.

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has fastened a trust on his property in favour of them all. Such trust or implied trust arises when there is some indication in a will creating a power of appointment that a testator intends a class, or some of a class, to take in default of the execution of the power by the appointee. The decision in *Brown* v. *Higgs* (1) as regards the Brize Norton leasehold lands, to which a trust and not a mere power was held to be attached by the will in question in that case, is a distinct authority in defendants' favour. *Harding* v. *Glyn* (2) very much resembles the present case. See also *Moore* v. *Ffolliott* (3).

In *Sinnott* v. *Walsh* (4) it was held that there was a gift by implication, in default of appointment, to all the objects of the power in equal shares, because there was a definite intention to benefit individuals, or some individual member of a class to be selected by another person; and no selection having been made, the Court carried into effect the general intention in favour of the group of beneficiaries. The testator in this case shows a general intention in favour of a class, and a particular intention in favour of one particular member of the class, who is to be selected by another, and the particular intention having failed, by reason of the fact that no selection was made, the general intention prevails, and so there is an implied trust for the benefit of all the objects of the power: see judgment of FitzGibbon L.J. in *Sinnott* v. *Walsh* (4), at p. 39; *Burrough* v. *Philcox* (5).

The words of the will in the present case are clear and specific in the creation of a trust, and show clearly an intention to benefit the sons of Owen as a preferential class. Once you find an existing trust, the property which it affects cannot go to the next-of-kin. The Court will not impute intestacy. The will shows that the testator did not desire that any of his property should go to his brothers Owen and Michael, who were his next-of-kin at his death. Owen is merely the trustee of his will and to exercise the power of selection, but Owen himself gets nothing.

In the result the defendants are entitled to the farm of Tenure and the residuary personal estate of testator.

Cur. adv. vult.

(1) 4 Ves. 708; 5 Ves. 495; 8 Ves. 561.
(2) 1 Atk. 469; 2 Wh. & Tud. (8th ed.) 339.
(3) 19 L. R. Ir. 499.
(4) 5 L. R. Ir. 27.
(5) 5 Myl. & Cr. 72, 92.

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Feb. 28.

PIM J. :—

Christopher Kieran, of Tenure, in the County of Louth, farmer, by his will dated the 23rd day of March, 1876, made the following devise and bequest :—

"I give devise and bequeath my farm of land in Tenure and all my estate and interest therein, and all my cattle farming stock and implements of husbandry and all other property whatsoever of which I may die seized or possessed unto my brother Owen Kieran of Kieran's Cross, upon trust for his son John Kieran until he shall attain his full age of twenty-one years, when I will and direct said farm of land, cattle, farming stock &c. to be given over to my said nephew John Kieran provided his father the said Owen Kieran shall consider his conduct deserving the same, but in the event of the death of my said nephew John Kieran before he shall attain his age of twenty-one years, or of his father deeming him undeserving of said bequest, then I direct my said trustee to hold said farm of land and all other goods and chattels of every kind whatsoever upon trust for such other son of my said brother Owen Kieran as my said brother shall appoint."

Christopher Kieran died on the 11th December, 1883, without having altered his said will.

John Kieran, the *cestui que trust* named in the will, died on the 29th day of April, 1889, without having attained the age of twenty-one years.

Owen Kieran, the brother of the testator, and the donee of the power, died on the 26th May, 1915, without having exercised the said power, leaving him surviving three sons, viz., the defendants, Michael Joseph Kieran, James Kieran, and Patrick Kieran.

The question now arises, whether the three sons of Owen Kieran take the estate of the deceased testator Christopher Kieran in equal shares as tenants in common, or whether there is a failure of the trust contained in the will, in which event the next-of-kin of Christopher Kieran would take the said estate.

There is no decision in the books which answers the question raised. There are several cases which give some assistance in arriving at a conclusion, but the point, as now raised, has not as yet been decided. It is true that there are two old cases which

are not unlike this case. There is the case of *Moseley* v. *Moseley* (1), in which a somewhat similar trust came before Lord Nottingham, and in which he seems to have decided that if the donee of a power failed to exercise a discretion similar to the discretion in this case, the Court would exercise it for him. That case is interesting historically, but is otherwise of very little value, for the Court of Chancery has now for a very long period of years uniformly refused to do what Lord Nottingham seems to have done, namely, to exercise a discretion in cases of this kind.

There is another case of *Richardson* v. *Chapman* (2) in which, under very special circumstances, the House of Lords nominated a person to take under a trust. This decision, however, depended entirely on the peculiar circumstances of the case as presented to the House, and is of little value in deciding the point now at issue.

Mr. Poole, in his argument on behalf of the plaintiffs, cited the well-known case of *Brown* v. *Higgs* (3). In that case an estate was devised to "one of the sons of my nephew Samuel Brown as the said John Brown shall direct by a conveyance in his lifetime, or by his last will and testament," and John Brown, not having exercised the power, Lord Alvanley, then Sir Richard Pepper Arden, was inclined to think, though he would not decide the point, that the children of Samuel Brown could not establish a claim. He seemed to consider that the power was a mere power, and that no trust could be implied therefrom. It is not easy to ascertain what Lord Eldon's opinion was, when the case came before him on appeal from Lord Alvanley (4), and all that can be said is that he upheld the Court below. Lord St. Leonards, in his book on Powers (8th ed., p. 593), in discussing this case, says that in his opinion the power was clearly a simple power, and he further says that a power to appoint to such one of a class as a person shall name, authorizes the gift to one only of the class; no larger number, much less the whole class, can be made objects of the power. He adds:—"If, therefore, the power is in the nature of a trust, or there is a gift in the power itself by implication, it can only be commensurate

(1) Rep. *temp.* Finch, 53.
(2) 7 Bro. P. C. 318.
(3) 4 Ves. 708; 5 Ves. 495.
(4) 8 Ves. 561, 574.

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with the power, and therefore for one only of the objects," and he ends with this question, "Which one would be the proper *cestui que trust*, or the person in whose favour the implied gift was made?" Lord St. Leonards, with great discretion, left the question unanswered, but it has been assumed by text-writers since that time that the Lord Chancellor meant to convey that if any gift could be implied in default of appointment, it ought to be to one person only of the class, and as no gift can be implied to one more than to another, that none of the class can take by implication.

Now, it is quite clear that a trust implied through and by reason of a power cannot be greater than the power itself. It is commensurate with it; and there is a great deal to be said for the meaning taken by text-writers from Lord St. Leonards' words in the case of a power, and a trust to be implied from such power; but whether such writers are right or wrong in their interpretation of Lord St. Leonards' words, the point with which the Lord Chancellor dealt is not the same point that is raised in this case, and I think I may say that the exact question that is now before the Court has, since the time of Lord Nottingham, not only not been answered, but has probably never been put to any Court.

In this case it is not a question of a power coupled with an implied trust at all. It is a trust with a power engrafted on it. The trust created by the will in Owen Kieran is a trust, first for a named person, and, in case of his death under twenty-one, a trust (I assume this for the moment) for a successor as yet unascertained, but to be ascertained by the said Owen Kieran. The power given to the said Owen Kieran is a limited power. It enables him to choose the successor, but the trust still remains a trust pointing to a class with a limited power of appointment in the donee.

Now, before discussing the exact effect of this, I desire to say that the particular words used, viz.: "for such other son as my said brother shall appoint," do not seem to me to be as strong as Mr. Poole argued. If the words had been "for one only of the other sons of my said brother," it would be clear that the power could be exercised only by giving the estate to one of the sons; but the words "such other son" seem to me to be possibly wide enough to enable the Court to bring it within the doctrine laid down

in *Sinnott* v. *Walsh* (1). The words there were "whatever existing member of my family he may be disposed to will it to," and I am disposed to think that the reasoning of Lord Chancellor Ball in that case might be sufficient to rule this case also. But as Mr. Poole has argued this case on the supposition that the words could not be held to point to more than one of the sons, and do not point to a class, I desire to decide the case on that assumption.

Now, it is the recognized duty of every Court to carry out a trust if it is possible to do so, and, if it is possible, a Court will avoid a construction which must result in an intestacy, and in the carrying of the property, possibly wholly, probably largely, to persons whom the testator never meant to get it.

What is the position of the three surviving sons of Owen Kieran? The testator has clearly expressed his intention that one of them at least should get the property. Each of them has a kind of contingent estate in the assets. If any two of them died, the Court could not refuse to give it to the survivor. If any two of them renounced, the Court could not refuse to give the property to the third. They all possess a similar and equal contingent estate, and a similar *spes successionis*. To hold that this trust has utterly failed would be manifestly doing violence to the testator's wishes, and in connexion with this it is important to recollect that there is no gift over. To hold that the three sons took equally would be, at all events, carrying out to a certain extent his declared desire. It might be argued that this would amount to an extension of the doctrine of *cy-près* to trusts, but I do not so regard it. I am inclined to think that the Court, without doing any violence to the canons of interpretation, may infer from the words used that the desire of the testator was that the three sons should take equally if for any reason the power were not exercised.

There is a case of *Longmore* v. *Broom* (2), in which a testator bequeathed property to his two brothers and his sister or their children in such shares as the trustees should think proper. The trustees failed to exercise any discretion, and the matter came before the Court to say what should be done. It was argued that

(1) 3 L. R. Ir. 12; 5 L. R. Ir. 27. (2) 7 Ves. 124.

Pim J. (for Barton J.) 1916.

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the word "or" indicated that the property was to be given to the brothers and sister on the one hand, or their children on the other hand; and the Court was pressed to read the word "or" as "and." The Master of the Rolls (Sir William Grant) refused to do this, and he said as follows (p. 128):—"A bequest to *A* or *B* is void; but a bequest to *A* or *B* at the discretion of *C* is good; for he may divide it between them."

Now, what is this case but a bequest to *A* or *B* or *C* at the discretion of the trustee? If this is the way in which it should be read, then the trustee has a power of dividing the property between them.

On every ground, whether the gift is to be regarded as a gift to a class, or is to be regarded as a gift to one of a class, if the donee of the power should exercise his discretion, I am of opinion that in default of the exercise of the power the class must take, and I so decide.

Question (1) will be answered "Yes."

Solicitors for plaintiffs: *Smyth & Son.*
Solicitors for defendants: *Quirke & Co.*

R. W. L.

LINDESAY *v.* DARLINGTON AND OTHERS.

M. R.
1916.
May 23.

Practice—Claim by a Defendant against a Co-defendant—Trial of Issues between Co-defendants—Supreme Court of Judicature (Ireland) Act, 1877 (40 & 41 *Vict. c.* 57), *s.* 27, *sub-s.* 3.

The plaintiff brought an action against four defendants, D., B., M., and J., in which she sought to have it declared that she was entitled to an undivided share of certain lands, and claimed an account of the rents and profits of the said lands received by the defendants or any of them, and payment of her share thereof. In her statement of claim she alleged that the defendant D. had received and retained the entire of the rents and profits of the said lands since the 25th June, 1912, and had never accounted for the same. The defendants D. and M. did not enter any appearance to the writ. The defendants B. and J. appeared, and delivered a joint defence, in which, after denying that they, or either of them, had received any part of the rents and profits of the said lands, they claimed to be entitled to certain shares respectively of the said lands, and of the rents and profits thereof received by the defendant D. since the 25th June, 1912, and stated that at the trial of the action they would apply for an order declaring that they were entitled to the aforesaid respective shares of the said lands and of the rents and profits thereof, and directing the defendant D. to pay to them respectively similar parts of the amount which should be found to have been received by her in respect of the rents and profits of the said lands since the 25th June, 1912.

On a motion on behalf of the defendants B. and J., the Court made an order declaring that delivery of their defence to the defendant D. should be deemed notice to her, under the Supreme Court of Judicature (Ireland) Act, 1877, s. 27, sub-s. 3, of their respective claims against her mentioned in their said defence, and that the questions in the action between them and her should be determined in the action.

MOTION.

The action was brought by Charlotte Lindesay against Eleanor Marian Darlington, Mary Anne de la Poire Murphy, Catherine Beatty, and Alice Ethel Jacob—(1) to have it declared that the plaintiff was entitled to thirty-five undivided ninetieth parts of all the estate and interest of one Susan Murphy, deceased, in certain lands devised upon trust by the will of the said Susan Murphy; (2) to have an account taken of the rents, issues, and

M. R. 1916. LINDESAY v. DARLINGTON.

profits of the said lands accrued since the 25th June, 1912, and received by or on behalf of the defendants, or any of them; (3) for the payment to the plaintiff of thirty-five ninetieths of the amount found upon the taking of such account to have been received by or on behalf of the defendants, or any of them. In her statement of claim the plaintiff alleged that the defendant Eleanor Marian Darlington had, since the 25th June, 1912, received and still retained the entire of the rents, issues and profits of the said lands, and had omitted to pay to the plaintiff the share thereof to which the plaintiff was entitled, although requested so to do, and that the said defendant had never accounted to the plaintiff for any part of the said rents, issues and profits so received and retained by the said defendant. The defendants Eleanor Marian Darlington and Mary Anne de la Poire Murphy did not enter any appearance in the action, but the defendants Catherine Beatty and Alice Ethel Jacob appeared and delivered a joint defence, in which, after denying that they, or either of them, had received any portion of the rents and profits of the said lands accrued since the 25th June, 1912, they alleged that by reason of the matters set forth in the statement of claim they were, since the 25th June, 1912, respectively entitled to twenty undivided ninetieths and one undivided ninetieth of the said lands; that since the 25th June, 1912, the defendant Eleanor Marian Darlington had received and still retained the entire of the rents and profits of the said lands, and had paid no part thereof to the defendants Catherine Beatty and Alice Ethel Jacob, although requested so to do, and had not accounted for the same. The defendants Catherine Beatty and Alice Ethel Jacob further claimed and stated that they would, at the hearing of the action, apply to the Court for an order declaring that they were respectively entitled to twenty undivided ninetieths and one undivided ninetieth of the said lands, and directing that the defendant Eleanor Marian Darlington should pay to them similar parts of the sum which on the taking of the account claimed should be found to have been received by the said defendant in respect of the rents and profits of the said lands since the 25th June, 1912.

The defendants Catherine Beatty and Alice Ethel Jacob

now moved for an order that the delivery of their statement of defence to the defendant Eleanor Marian Darlington should be deemed notice to the said defendant under the Supreme Court of Judicature (Ireland) Act. 1877, sect. 27, sub-s. 3, of their respective claims against her mentioned in their defence, and that the questions between them and the defendant Eleanor Marian Darlington might be determined in this action.

Ellison for the defendants Catherine Beatty and Alice Ethel Jacob:—

There is no Rule of Court dealing with a claim by one defendant against another defendant. [He referred to the Supreme Court of Judicature (Ireland) Act, 1877, sect. 27 (3), and *Marner* v. *Bright* (1).]

Gustavus Hamilton for the plaintiff.

There was no appearance on behalf of the defendant Eleanor Marian Darlington.

O'CONNOR M.R.:—

The defendants Catherine Beatty and Alice Ethel Jacob want to be in a position to get the same judgment in this action against their co-defendant, Eleanor Marian Darlington, as the plaintiff can obtain against her. I can see no objection to granting the order asked for. I shall declare the plaintiff entitled to her costs, and reserve the costs of the defendants Catherine Beatty and Alice Ethel Jacob.

The order made was as follows:—

This Court doth order that the delivery of the statement of defence of the defendants Catherine Beatty and Alice Ethel Jacob to the defendant Eleanor Marian Darlington be deemed notice to the defendant Eleanor Marian Darlington, under the Supreme Court of Judicature (Ireland) Act, 1877, sect. 27, sub-s. 3, of the claims of the defendants Catherine Beatty and Alice Ethel Jacob respectively against the defendant Eleanor Marian Darlington, mentioned in their said statement of defence, and that the questions in this action between the defendants Catherine Beatty and

(1) 11 Ch. D. 394, *note*.

M. R. 1916. LINDESAY v. DARLINGTON.

Alice Ethel Jacob respectively, and the defendant Eleanor Marian Darlington, be determined in this action. And this Court doth declare the plaintiff entitled to her costs of this motion, and doth reserve the question of the applicants' costs.

Solicitors for the plaintiff: *Hamilton & Craig.*

Solicitors for the defendants Catherine Beatty and Alice Ethel Jacob: *Alex. Bell & Sons.*

A. H. W.

Barton J. 1916.

May 29. June 9.

IN RE MURRAY.

MURRAY *v.* CONDREN.

Estate pur autre vie—*No words of Limitation—Devolution of Estate—Special Occupant—Intestacy.*

A lessee of lands which had been demised to the lessee, his heirs, and assigns for three lives or thirty-one years, conveyed the lands by deed to M. to hold the same unto and to the use of M. for the existing lives, without using words of limitation. M. afterwards died intestate as regards the lands.

Held, that M's. interest in the lease passed on his death to his personal representative, and not to his heir-at-law.

ORIGINATING SUMMONS.

Charles Murray, who died in 1915, was, at the time of his death, entitled to the messuages and premises 32, 33, 34, Ferry-bank, Arklow, held under lease dated the 10th August, 1867, from the Earl of Wicklow to Joseph Kearon. By that lease the premises were demised to Joseph Kearon, his heirs, and assigns, for the lives of the Duke of Connaught, the Duke of Albany, and Princess Henry of Battenberg, and the lives and life of the survivors and survivor, or thirty-one years from the 25th March, 1867.

By indenture dated the 2nd August, 1901, made between William Kearon and others of the first part, and Charles Murray of the second part, reciting the lease of the 10th August, 1867, and reciting an agreement by the vendors to sell to Charles Murray all their interest under the lease, the parties of the first part, being the persons entitled under the will of Joseph Kearon, deceased, conveyed to Charles Murray all the hereditaments and premises comprised in and granted by the recited indenture of lease, to

hold the same unto and to the use of Charles Murray for and during the lives of the Duke of Connaught and the Princess Henry of Battenberg, and the lives and life of the survivors and survivor, subject to the rents, covenants, and conditions reserved by and contained in the lease.

The plaintiff, Mary Jane Murray, widow of Charles Murray, brought the present summons against the defendants, the executors of the will of Charles Murray, asking for certain accounts, and for the determination of certain questions.

It was admitted that the premises comprised in the lease passed on the death of Charles Murray as if Charles Murray had died intestate as regards the premises.

Poole, for the plaintiff:—

Under the circumstances, the personal representative and not the heir of Charles Murray takes: Sect. 6 of the Wills Act (1 Vict. c. 26), repeating similar provisions in the Statute of Frauds; Landlord and Tenant (Ireland) Act, 1860 (23 & 24 Vict. c. 154), sect. 9. "It has long since been established that in determining the quality of an estate *pur autre vie*, that is, whether it goes to a special occupant or by statute to the executor, you look to the terms of the last conveyance of the estate and not to the original grant, to ascertain whether it goes to the heir or to the legal personal representative. If it is to go to the heir, my present impression is that express words are necessary, and that in a deed, at all events, the word 'heir' must be used for the purpose of designating the special occupant": *per* Lord Davey in *Earl of Mountcashell* v. *More-Smyth* (1). *Wall* v. *Byrne* (2) was the case of a will, and has no application to the present case. Certain dicta in *King* v. *King* (3) are against me, but they conflict with *Croker* v. *Brady* (4). *King* v. *King* (3) was not followed in *In re Inman, Inman* v. *Inman* (5). I ask the Court to assimilate the Irish to the English decisions.

Garrett W. Walker K.C., for the heir-at-law:—

The original lease to Joseph Kearon stamped on the lease the character of an estate descendible to heirs. Where that character

(1) [1896] A. C. 158, at p. 163.
(2) 2 Jo. & Lat. 118.
(3) [1898] 1 I. R. 91; [1899] 1 I. R. 30.
(4) 4 L. R. Ir. 653.
(5) [1903] 1 Ch. 241.

Barton J. 1916. MURRAY v. CONDREN.

remains unaltered in the assignee, it passes to the heir-at-law. The lessee took an estate *pur autre vie* with the attribute of the heir as special occupant attached to it. The lessee's assignee takes the same estate. *The Earl of Mountcashell* v. *More-Smyth* (1) was decided on the construction of the original deed which created the estate. No question of the effect of a subsequent devolution by deed was raised in that case. In *King* v. *King* (2) it was laid down that "if lands are granted *pur autre vie* to *A* and his heirs, and if *A*, by deed or will, gives all his estate in those lands to *B* without any words of limitation, *B*'s heir, and not his personal representative, will succeed *B* as special occupant": *per* Fitzgibbon L.J., at p. 34. The judgment of Holmes L.J. was to the same effect. That case, though not followed in *In re Inman*, *Inman* v. *Inman* (3), is binding on this Court. There is no direct authority on the point involved here; there are merely dicta. These dicta are opposed to each other; but the dicta in my favour in *King* v. *King* (2) are more recent than those in *Croker* v. *Brady* (4), and were carefully and deliberately expressed by FitzGibbon and Holmes L.JJ.

Edmond Lupton, for the defendants, the executors of Charles Murray.

Cur. adv. vult.

June 9.

BARTON J.:—

A lease *pur autre vie—habendum* to the lessee and his heirs—was conveyed to Charles Murray without words of limitation, and at his death was undisposed of by his will. The question for decision is whether it went to the heir of Charles Murray as special occupant, or to the personal representative under sect. 6 of the Wills Act, which provides that "if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature . . . and in case there shall be no special occupant . . . it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant." Similar words occur in sect. 9 of the Irish Land Act of 1860.

It is conceded that no words of limitation are necessary to pass the entire and absolute interest in an estate *pur autre vie*:

(1) [1896] A. C. 158.
(2) [1898] 1 I. R. 91; [1899] 1 I. R. 30.
(3) [1903] 1 Ch. 241.
(4) 4 L. R. Ir. 653.

Brenan v. *Boyne* (1). Accordingly, Charles Murray, by the grant to him, took the entire interest of the lessee in the lease. It is also conceded that an estate *pur autre vie* is not, properly speaking, a descendible freehold, and that the owner of such an estate can alter its descendible character, and limit it to *B* and his heirs, or to *B* and his assigns, or to *B* and his executors and administrators, or to *B* simpliciter, changing as he pleases the limitations of the tenure. In the present case it was limited to *B* simpliciter, and *B* has died without effectively disposing of it. Does the heir-at-law or the personal representative take the property?

It is strange that the point is not the subject of any reported decision. The nearest case seems to be *Croker* v. *Brady* (2), where a lease for lives—*habendum* to the lessee, his "heirs and assigns"—was conveyed by a settlement to trustees, their executors, administrators, and assigns, upon trust, after certain life interests, for the children of the marriage, subject to appointment, and, in default of appointment, for the children absolutely, but without words of limitation. Before the determination of the life interest, the children died under age and unmarried. It was held by the Court of Appeal, consisting of Sir E. Sullivan M.R., Deasy L.J., and FitzGibbon L.J., that the personal representative, and not the heir-at-law of the children, became entitled to the beneficial interest in the lease. After pointing out, at p. 657, that "in limitations of property of this description it is well settled that it is the last conveyance which regulates the devolution of the estate, and that it is to it that we must look when a question arises as to such devolution," Sir E. Sullivan went on to say, at p. 659, that "it appears to us that under the limitation I have stated of the interest *pur autre vie*, namely, an assurance to trustees and the survivor of them, his executors, administrators, and assigns, to hold the legal estate, but in trust for *A*, *A* has either the equitable estate in him and his executors corresponding to the limitation of the legal estate out of which he derives his equitable estate, or he has the estate in him without any special occupant named, in which case the words of the Statute of Wills are precisely applicable." The latter words apply very nearly to the present case. At p. 660 Sir E. Sullivan, by way of illustration, put the

(1) 16 Ir. Ch. R. 87. (2) 4 L. R. Ir. 653.

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case which I have now to decide. He says: "Now suppose that by deed, *A*, having the same interest, assigns to *B* in the same words, how could it be supposed that there was any difference in the rights of the heir? He is not named, and, therefore, he cannot take. Again, suppose the assignment was simply to *B*, leaving out assigns, there is now no special occupant named, and the executors or administrators would take under the statute to the equal exclusion of the heir." Deasy L.J. and FitzGibbon L.J. concurred.

Reliance was placed by counsel for the heir-at-law upon *Wall* v. *Byrne* (1), which Sir E. Sullivan in *Croker* v. *Brady* (2) was careful to distinguish from the case before him, and upon *King* v. *King* (3). Swinfen Eady J., in *In re Inman* (4), declined to follow these cases, but they would be binding upon me *in consimili casu*. They were cases of devises by will, and are distinguishable from the present case, in which we have to deal with a grant by deed. My only difficulty has been caused by some passages in the judgment in *King* v. *King* (3), where the Lords Justices, differing upon this point from Sir A. M. Porter and from Sir E. Sullivan, indicated an opinion that they saw no difference in this respect between a transfer by deed and a gift by will. I am relieved from the invidious task of choosing between these conflicting opinions, because I think that, so far as *obiter dicta* are concerned, the scale is turned by what Lord Davey said in the case of *Earl of Mountcashel* v. *More-Smyth* (5) :—"If," said Lord Davey, at p. 165, "it (*i.e.*, the estate *pur autre vie*) is to go to the heir, my present impression is that, in a deed at all events, the word 'heir' must be used for the purpose of designating the special occupant."

Under these circumstances I feel at liberty to give effect to my own opinion, and to hold that, as no special occupant was named in the last conveyance, and as the estate *pur autre vie* is undisposed of by the will, the premises in question pass to the personal representative of Charles Murray, and not to his heir-at-law.

Solicitor for the plaintiff: *George F. Fleming.*
Solicitor for the executors: *D. C. Bergin.*
Solicitors for the heir-at-law: *M. J. O'Connor & Co.*

D. M. S

(1) 2 Jo. & Lat. 118.
(2) 4 L. R. Ir. 653.
(3) [1898] 1 I. R. 91; [1899] 1 I. R. 30.
(4) [1903] 1 Ch. 241.
(5) [1896] A. C. 158.

LA PRIMAUDAYE *v.* CONWAY (1).

(1915. No. 984.)

Appeal.
1916.
Feb. 11.

Practice—Staying Action—Transfer of Chancery Action to County Court—County Officers and Courts (Ireland) Act, 1877 (40 & 41 *Vict. c.* 56), *s.* 36.

The plaintiff had brought an action in the Chancery Division claiming a declaration that the defendant held certain lands as yearly tenant to the plaintiff with a limited right to graze cattle over other lands, and an injunction. The defendant, who claimed a larger right of grazing, having applied to have the action transferred to the county court, the Court made an order, *in invitum* the plaintiff, staying the action, and giving the plaintiff liberty to proceed by ejectment in the county court in respect of the lands.

Held, by the Court of Appeal, that there was no jurisdiction to make such order.

The judgment of O'Brien L.C. in *Fanning* v. *New Ross District Council*, 47 I. L. T. R. 212, explained.

APPEAL from an order of the Master of the Rolls staying the action and giving the plaintiff liberty to proceed by ejectment in the county court.

The writ of summons in the action claimed (*a*) a declaration that the defendant held as yearly tenant to the plaintiff part of the lands of Glennamong, in the county of Mayo, containing twelve acres statute measure, with the right to graze ten head of cattle and twenty sheep, or one horse and nine head of cattle, and no more, over the mountain lands of Glennamong; and (*b*) an injunction restraining the defendant or his under-tenants from grazing more than the specified number of cattle, sheep, or horses.

The statement of claim alleged that the plaintiff held, under a lease for a term of ninety-nine years from the 1st November, 1857, the lands of Glennamong, containing 4454A. 1R. 25P. statute measure. That in and prior to the year 1892 the defendant was tenant to the plaintiff of portion of these lands

(1) Before SIR IGNATIUS J. O'BRIEN L.C., and RONAN and MOLONY L.JJ.

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containing twelve acres, with a right of grazing over the mountain lands of Glennamong, at the yearly rent of £9 4*s.* 8*d.* That in 1892, the defendant having applied for a reduction of rent, by an agreement in writing it was agreed that the defendant should give up any rights of grazing he might have over the mountain lands of Glennamong, reserving only his present house and the land then tilled and the grass of ten head of cattle and twenty sheep on the said mountain, or one horse and nine head of cattle, and receiving instead a reduction of rent to £4 12*s.* 4*d.* instead of £9 4*s.* 8*d.*, as theretofore. That on the 6th November, 1913, the plaintiff entered into an agreement with the Congested Districts Board for the sale of the said lands, subject to the sub-tenancy of the defendant with the grazing right specified in the above agreement. That the defendant in breach of the said agreement was grazing on the said mountain lands, by himself and persons authorized by him, cattle, sheep, and horses largely in excess of the numbers specified in the agreement, and that although required by the plaintiff to desist he refused to do so.

The defendant applied to the Court for an order that the suit should be transferred to the county court judge of county Mayo. The application was grounded on an affidavit of the defendant which set out (*inter alia*) that the defendant had been tenant of the entire lands to which the suit referred from the year 1880 down to the present time, which lands consisted of a large mountain, and had been in exclusive occupation during that period. That he had put as many cattle, sheep, and other stock on the lands as he required, and possessed not merely a right of grazing over the lands in question, but had been tenant entitled to the possession of them. That in the year 1892 it was agreed that he should act as gamekeeper over the mountain, and that the plaintiff should allow him half the rent for his services as gamekeeper. That at the time of this arrangement he signed (as marksman) an agreement which he then believed embodied these terms. That if the agreement contained a surrender of any part of his holding, he was unaware of this when he signed, and would not have signed a surrender of any part of his holding. That if the document referred to in the statement of claim contained a surrender, he would take immediate steps to have it set aside in

the Mayo county court. That the annual value of the lands to which the suit related was £9 4*s.* 8*d.*

The plaintiff made an affidavit to resist the application, which set out (*inter alia*) as follows:—That the dispute in the action arose as regarded the mountain lands of Glennamong, which comprised 4454A. 1R. 25P., the poor law valuation of which was £36 15*s.*; and that as the defendant claimed a right to the entire of the mountain, the valuation was in excess of the county court jurisdiction. That the deponent had purchased the interest of the lease under which he held the lands of Glennamong, with other lands, in the year 1871 for the sum of £4800. That he was paying a rent of £382 a year for the lands of Glennamong with the other lands; and that as Glennamong was nearly half the entire land comprised in the lease, he estimated that the proportion of the head rent payable by Glennamong would amount to at least £150 a year. That the defendant's tenancy was only of his cottage and a small portion of land with the grass of ten head of cattle and twenty sheep, or one horse and nine head of cattle. That the defendant admitted that this was all he was entitled to, and that he was willing that this should be embodied in an agreement, and accordingly on the 23rd June, 1892, the agreement mentioned in the statement of claim was entered into. That the deponent never heard of the present claim until he had entered into a contract with the Congested Districts Board for the sale to them of the estate. That the defendant's claim was preventing the deponent from concluding the sale with the Congested Districts Board, all other matters having been adjusted, and exposing him to great expense and delay. That the only reason he had for reducing the defendant's rent was that he pleaded great poverty, and that he was quite unable to pay it.

The defendant filed an affidavit in reply in which he stated that he did not claim the entire of the mountain of Glennamong, but that his claim was only as to 1000 acres or thereabouts which was divided from the rest of the lands of Glennamong by the Glennamong river, and comprised only about one-fourth of the entire of the lands.

The Master of the Rolls made an order, the material part of which was as follows:—"The defendant by his counsel under-

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taking to abide any order this Court may hereafter make as to the grazing rights of the defendant over the lands of Glennamong . . . in the pleadings mentioned, or any part thereof, this Court doth stay the proceedings in this action, and doth grant liberty to the plaintiffs to proceed by ejectment in respect of said lands in the Court of the County Court Judge of the County of Mayo, and this Court doth grant liberty to either of the said parties to apply to the Court as occasion may require, and doth reserve the question of costs."

Jellett K.C. and *Sainsbury*, for the appellant:—

The action was properly brought in the Chancery Division, and there was no jurisdiction to stay it against the will of the plaintiff. The action is not one which ought to be transferred to the county court. We are willing to undertake that the plaintiff will not ask for more than county court costs, whatever the result of the action.

FitzGerald Kenny, for the respondent:—

The Master of the Rolls in making the order followed the suggestion of O'Brien L.C. in *Fanning* v. *New Ross District Council* (1), that such course might be adopted. [He also referred to *Thornton* v. *M'Taggart* (2).]

SIR IGNATIUS J. O'BRIEN L.C.:—

We are of opinion that the order made by the Master of the Rolls cannot stand. He has made an order putting a stay on the action, that is to say, he refuses to try it, giving liberty to the plaintiff to proceed by way of ejectment in respect of the lands in the county court. He made this order because, as has been stated to us, he considered that the Court of Appeal in the case of *Fanning* v. *New Ross District Council* (1) had suggested that such an order could be made *in invitum* a person who had lawfully sought relief from the Court in an action properly framed, and within the jurisdiction of the Court. In that case the judgments of the majority of the Court are perfectly clear. The majority of the Court considered that there was jurisdiction under sect. 36 of the County Officers and Courts (Ireland) Act, 1877, to transfer

(1) 47 I. L. T. R. 212. (2) 44 I. L. T. R. 119.

the action, because it could have been commenced in the county court. The only question in dispute arose from the contention that the Court had no jurisdiction to make the order asked for by reason of the peculiar form in which the action was brought. The majority of the Court, however, made an order removing the case from the Superior Court to the County Court. I use the word "removing," because the order was in its effect intermediate between a transfer and a remitting order. I did, in that case, state in my dissenting judgment that I should have been prepared, if necessary, to hold that the Court might stay the proceedings, and let the plaintiff bring a civil bill. But that was merely a suggestion thrown out by me as a possible solution of a difficult position. It was not the view of the majority of the Court. I entirely agree that once the jurisdiction of the Court is properly invoked, it cannot refuse to permit an action to be tried. It must either hear the action, or in a proper case transfer it to the county court.

In the present case the action is, in my opinion, of an important character. Its real object is to accelerate matters, and avoid a hitch in the transfer of the landlord's estate to the Congested Districts Board. The claim made by the defendant affects 1000 acres of land. No doubt the value of the land as compared with the acreage may be small, yet for the purpose of dealing with the Congested Districts Board the existence of lands of considerable acreage in the district which can be used for grazing purposes is an important matter. Whether I regard the object for which the action is brought, or the acreage of the land involved, I am of opinion that the action is not one which ought to be transferred to the county court under the jurisdiction given by sect. 36 of the County Officers and Courts (Ireland) Act, 1877. The only matter which might make me hesitate as to this has been got over by the offer of the plaintiff not to claim more than costs on the county court scale, whatever the result of the action. This offer will be taken down on the order, and the order of the Master of the Rolls will be discharged.

Solicitor for the appellant: *Sainsbury & Co.*

Solicitor for the respondent: *H. J. MacTernan.*

J. G. T.

M. R. 1915.
Mar. 3, 4, 18. June 22.
Appeal. 1916.
Jan. 21, 25.

HIBERNIAN BANK *v.* W. J. YOURELL AND OTHERS.

(1913. No. 1030.)

Banker and Customer—Mortgage by Customer to Bank to secure Current Account—Appointment of Receiver by Bank—Moneys realized out of mortgaged Property paid to Bank—Account continued to be kept in Books of Bank, Interest being capitalized every Half-year—Date when Bank Account deemed closed—Mode in which Mortgage Account to be taken.

In 1899 the plaintiff bank opened a current account with the defendant W. J. Y. The latter being indebted to the bank on foot of the current account, and also on foot of a bill account, by deed of the 20th November, 1899, covenanted with the bank to pay to them the sum of £5700 and interest thereon; and also on demand to pay to them the balance which on any account or accounts might be owing by him to them on foot of over-drafts, bills of exchange, promissory notes, loans, credits, advances, interest, commission, discount, premiums on policies of assurance, costs, customary charges, or otherwise, and charged certain lands with payment of the moneys due on foot of the said covenant. By this deed the defendant F.J. conveyed other lands to the bank subject to redemption on payment of the same moneys; the defendant D.Y. charged other lands with the same moneys; and the remaining defendants postponed their interests in the mortgaged lands to the security of the bank. The deed contained a provision that no greater principal sum than £5700 should be recoverable on the security thereof, but that to that extent the same should be a continuing security to the bank as well for money due on current securities and current accountsas for money actually payable. In March, 1904, when the current account of W. J. Y. was largely over-drawn, the bank intimated to him that the debt must be called in and the securities realized. Subsequent to this no lodgments were made by W. J. Y., and no cheques drawn by him, with the exception of certain cheques drawn by him at the request of the bank, and honoured by them, to pay rent, rates, and taxes, due in respect of the mortgaged lands. On the 17th December, 1904, the bank appointed a receiver over the mortgaged lands to the intent that he should "apply all moneys received by him as directed by sect. 24, sub-s. 8, of the Conveyancing and Law of Property Act, 1881," and from the year 1905 to the year 1910 the receiver continued in possession of the lands. The current account of the defendant W. J. Y. in the books of the plaintiffs was continued as an operative account. The account was balanced each half-year; interest was charged on the floating balance each half-year, and capitalized at the close of each half-year. The defendants contended that the plaintiffs were bound

by the form of the account so kept, and that, after giving credit for the amounts lodged by the receiver from time to time and for the proceeds of that portion of the mortgaged lands which had been sold, £5406 5*s.* 7*d.* principal had been paid off, and that the plaintiffs were not entitled to recover against the unsold lands any greater sum for principal than £293 14*s.* 5*d.*, being the difference between the said sum of £5406 5*s.* 7*d.* and the sum of £5700, the limit of principal money recoverable as fixed by the mortgage.

Held, by O'Connor M.R., that the plaintiffs were bound by the form of the account so kept by them, and that the accounts in this action should be directed on that basis.

Held, by the Court of Appeal (Sir Ignatius J. O'Brien L.C. and Molony L.J., Cherry L.C.J. dissenting), varying the order of the Master of the Rolls, that, notwithstanding the mode in which the accounts had been kept by the bank up to the time of action brought, the bank was entitled to have an account taken in the action on the basis that the current account of W. J. Y. was closed on the date of the appointment of the receiver, and that the account as from that date should be taken as an ordinary mortgagee's account.

TRIAL OF ACTION.

This action was instituted by writ issued on the 23rd December, 1913, by the Hibernian Bank against William J. Yourell and others, for an account of the money due to the bank upon the security of a mortgage of certain lands in the County of Meath held under yearly tenancies, and for the usual relief.

The facts of the case, and the questions raised before the Master of the Rolls, are sufficiently stated in the headnote and judgment.

Herbert Wilson K.C. and *R. G. L. Leonard*, for the plaintiffs.

S. L. Brown K.C. and *M'Cormack*, for the defendants other than W. J. Yourell.

Carrigan K.C. and *J. H. Russell*, for the defendant W. J. Yourell.

O'CONNOR M.R.:— March 8.

This is a mortgagee's suit brought for the purpose of realizing a claim under an indenture of mortgage dated the 20th November, 1899.

At the date of this mortgage, the defendant Wm. J. Yourell was entitled to two farms—Neilstown and Ribstown—held under chattel tenancies; the defendant Denis Yourell was entitled to the farm of Piercetown, held under a chattel tenancy; and the

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defendant Francis Yourell was entitled in fee simple to the farm of Killester.

The defendant Frances Yourell, who is the mother of all the other defendants, and the defendants Mary Elizabeth Yourell and Margaret M'Dermott, who are the sisters of the male defendants, had certain claims upon the lands which it is unnecessary to particularize.

The defendant William J. Yourell was a customer of the plaintiff bank, and required accommodation from the bank, which the bank agreed to give on the security of a mortgage on the lands of the defendant William J. Yourell and those of his two brothers, Denis Yourell and Francis Yourell. The defendants Frances Yourell, Mary Elizabeth Yourell, and Margaret M'Dermott, agreed to join in the mortgage for the purpose of postponing their claims on the lands to the claim of the bank. The concurrence of all the members of the family is partly explained by the fact that the accommodation asked for was, to some extent, for the defendants Denis and Francis, as well as for the defendant William. The whole family seem to have been interested in it.

By the indenture of mortgage, dated the 20th November, 1899, which is made between William J. Yourell of the first part, Denis Yourell of the second part, Francis Joseph Yourell of the third part, Frances Yourell of the fourth part, Mary Elizabeth Yourell of the fifth part, and Margaret Yourell of the sixth part, the defendant Wm. J. Yourell covenanted to pay the plaintiffs on the 20th February then next the sum of £5700, stated to be then due and owing by him to the bank, with interest at the bank rate computed from day to day when under £6 per cent. per annum, and at all other times at the rate of £6 per cent. per annum, and also to pay to the bank on demand the balance which on any account between William J. Yourell and the bank, either alone or jointly with any other person or persons, should, for the time being, be owing by him on foot of overdrafts, bills of exchange, promissory notes, or otherwise as therein mentioned, with interest at the rate aforesaid. By the indenture of mortgage the defendant William J. Yourell charged the two farms of Neilstown and Ribstown with the payment of all moneys which

should become due and owing on foot of his covenant. The defendant Francis Yourell conveyed the farm of Killester to the plaintiffs, subject to redemption on payment of the same moneys, and the defendant Denis Yourell charged the farm of Piercetown with the same moneys. The defendants Frances Yourell, Mary Elizabeth Yourell, and Margaret Yourell postponed their interests in the lands to the security given to the plaintiffs by the mortgage.

There is a clause in the indenture which requires to be specially noticed. In this clause it is declared that no greater principal sum than £5700 should be recoverable on the security of the indenture, but that to that extent it should be a continuing security to the bank.

At the time of the execution of the mortgage Wm. J. Yourell was not in fact indebted to the bank in the sum of £5700. Nothing, however, turns upon this, because there is no dispute as to the amount of the advances for which the defendant Wm. J. Yourell became personally liable.

After the execution of the mortgage William J. Yourell got the accommodation from the bank which he required, and his dealings with the bank appear to have been carried on in the ordinary course down to the year 1903. Advances were made to him on promissory notes in which his brothers joined, and these notes when they fell due were passed through his current account as is usual with bankers—that is, as soon as each note fell due the amount was debited to the current account, and as each note was taken up the amount, less discount, was credited. Up to the year 1903 William J. Yourell was also allowed to overdraw his current account in considerable sums.

In the year 1903 the liability of William J. Yourell to the bank had amounted to a large sum, and was made up in this way. He, along with his brothers, was liable on promissory notes for £3600 which fell due on the 29th November, 1903. The amount was not debited to the current account but to the post due bill account. On the 31st December the current account was balanced, and on the 1st January, 1904, a debit balance of £2820 3*s.* was entered on that account against the defendant William J. Yourell. In the next half-year, which ended the 30th June,

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1904, the debit balance on the current account was reduced to £2579 4*s.* 11*d.*, but the promissory notes amounting to £3600 remained due, not having been taken up, and the interest had not been paid.

A further disturbing circumstance then made its appearance. The defendant William J. Yourell allowed the rents of his two farms of Neilstown and Ribstown to fall into arrear, and ejectment proceedings had actually been commenced by the respective landlords. To save the lands from eviction, the bank paid the landlord of Neilstown one year's rent of Neilstown, £249 15*s.*, besides costs; and to the landlord of Ribstown a year's rent, £184 17*s.* 6*d.*, besides costs. Having so saved the lands from eviction, the bank undoubtedly had the right to assert a claim by way of salvage against each of the farms. That claim would be an equitable lien on each farm for the amount of rent paid in respect of it with interest until paid at the rate of £4 per cent. It is clear, however, that the bank treated the payments for the rents as personal loans to William J. Yourell of the same character as all other advances made to him on the security of the indenture of mortgage. The payments for rent are debited to the current account and go to make up the debit balance brought out against him at the end of the half-year on the 31st December, 1904, viz., £3401 0*s.* 10*d.*, which includes £79 10*s.* 6*d.* for interest at the bank rate, or at least £6 per cent. on the balance for the time being due. This is quite inconsistent with a salvage claim, which only carries interest at 4 per cent., and does not create personal liability.

The current account for the same half-year has also a debit entry of £95 12*s.* 5*d.* for interest on the purchase-money of Piercetown, and a further debit entry for an instalment due on Piercetown of £40 9*s.* 6*d.* This farm had been purchased under the Land Purchase Acts, and the payments were made to the Land Commission in discharge of the obligations on the farm. This farm, however, did not belong to William J. Yourell, and there is no possible explanation of bringing these amounts into his current account, unless they were treated as advances made to him, or at his request, on his personal credit with the added security of the mortgage. Of the same character must have

been the payment by the bank on the 20th December, 1904, of £124 17*s.* 6*d.* for the half-year's rent of Neilstown to the previous 1st November. This could not have been a salvage payment, because no ejectment could then have been brought, and it is further proof, if needed, that all the advances for rent which I have mentioned were made under the mortgage and not on the security of salvage lien, which would have given a claim paramount to the mortgage. The course pursued by the bank is easily explained. A salvage claim only carries simple interest at £4 per cent. Advances on current account carry interest at the bank rate, and the interest is converted into principal every time the account is balanced.

The next event which requires notice is the appointment of a receiver over the mortgaged lands. This was accomplished by deed dated the 17th December, 1904, whereby the bank appointed Mr. Patrick Leonard receiver over all the lands comprised in the mortgage. He went into possession at once as receiver, but he was unable to realize anything out of the lands till the 13th December, 1905, when he paid to the bank £281 1*s.* 9*d.* In the meantime the bank had paid another half-year's rent of Ribstown, and interest in lieu of rent of Piercetown, besides other outgoings, and, as before, debited the amounts to the current account, which was balanced again on the 30th June, 1905, with interest charged on the balance for the time being. This brought down a principal sum of £3797 16*s.* 3*d.* due by the defendant William J. Yourell, and the sum of £281 1*s.* 9*d.*, which I have mentioned as having been brought in by the receiver was credited against it—another dealing with the account wholly inconsistent with treating the payments for rent, etc., as salvage payments. From the year 1905 down to the year 1910 the receiver continued in possession of the lands. The current account of the defendant William J. Yourell was continued as it had been previously kept, viz., as an operative account, although he did not really operate on it himself. The account was balanced each half-year, and interest was charged on the floating balance, and the balance made up of principal and interest was carried down, and interest again charged on it for the next half-year. The moneys collected by the receiver were brought in and credited against the principal

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sum. I have very grave doubts whether this mode of keeping an account which had really ceased to be operative was legal. I am inclined to think that the bank was only entitled to charge simple interest during all these years; but the account was not impeached on this ground. The case of the defendants was rather based on the account as it was kept by the bank.

At the close of the half-year ending 30th June, 1910, the current account was, according to practice, balanced, and showed a principal sum of £3911 7*s.* 11*d.* owing. During the next half-year the farm of Neilstown was sold by the bank, under their mortgage, for £3540. Of this sum £2589 12*s.* was credited against the balance brought down from the previous half-year. The account was again balanced, according to practice, on the 31st December, 1910, and showed a balance of £1443 15*s.* 6*d.*, which was brought down as a principal sum bearing interest to the next half-year's account. Against this principal sum the residue of the purchase-money was credited, and at the end of the half-year, after giving further credit for rents brought in by the receiver, a balance was shown of £275 5*s.* 8*d.*, including interest. This balance was again brought down as a principal sum bearing interest, and the current account was kept as before, bringing to credit the rents of the unsold lands. This went on down to the end of 1913, when the debit balance was reduced to £26 13*s.* This debit balance was at once wiped out by a lodgment by the receiver of £178 13*s.* 2*d.* on the 13th January, 1914, which would have put the account in credit were it not that the bank on the same day debited the account with the sum of £156 10*s.* 1*d.* for interest on promissory notes for £2500, which had been debited to the post due bill account, and so brought the current account into debit again, the bank again charging interest on the overdraft which was made up of interest on the promissory notes. In the next year a further sum came to credit, which the bank again appropriated to pay interest on the promissory notes.

It is in these circumstances that the bank now claims the right to sell the lands of Ribstown, Piercetown, and Killester under the mortgage.

The main contention of the defendants was that £5700 principal money had already been realized by the bank, and that

under the clause in the deed which I referred to the bank is not entitled to realize anything more out of the lands.

The defendants say that £3540 was realized by the sale of Neilstown, and applied in payment of principal. They further say that all the moneys brought in by the receiver were credited against principal moneys, and that taking these into account the full principal sum of £5700 has been recovered out of the land, and that the limit of the security of the mortgage was reached.

The bank, on the other hand, says that part of the purchase-money of Neilstown must be taken to have been applied in discharging the salvage claim which it had against the lands of Neilstown, and that it is only the residue of the purchase-money which should be set off against the sum of £5700.

The bank further denies that any part of the rents paid in by the receiver should be treated as a payment on account of principal.

For the reasons which I have already indicated, I hold that no part of the purchase-money can be allocated to a salvage payment, and that the entire went in reduction of the full liability of £5700. If I were to yield to the contention of the bank, I should, adopting the language of Holmes L.J. in *Power's Policies* (1), be allowing the bank by an "afterthought to extend the limit of its security in a way never contemplated at the time the payments were made, nor for years afterwards."

I further decide that every payment made by the receiver and brought into the current account was a payment on account of principal, and recovered under the mortgage. If I arrived at any other conclusion, it would involve the re-opening and re-casting of the accounts kept by the bank from the year 1904 down to the present time. These accounts may have been kept on a wrong principle, and in a way which has worked out badly for the bank; but the system was deliberately adopted, and persevered in for a number of years. In my opinion, the bank is bound by its own conduct. It cannot convert interest into principal for the purpose of getting compound interest for a number of years, and, at the end, repudiate the charge made for

(1) [1899] 1 I. R. 6, at p 28.

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compound interest, and seek to have its accounts re-adjusted for the purpose of setting up a claim which appears to be more advantageous.

On going over the figures they seemed to me to show that the payments made by the receiver, the purchase-money, and two small sums of £18 and £10 received for labourers' plots, exceeded the £5700 limit. If this is so, and I am right in the opinion I have formed, the action should be dismissed. I have, however, not been asked to dismiss the action, but to direct an account, subject to a declaration as to the rights of the parties.

I will give a declaration that no greater principal sum than £5700 was recoverable on foot of the indenture of mortgage, dated the 20th November, 1899. I will direct an account of what principal moneys have already been recovered under the mortgage, and I will declare that on the taking of the said account the full sum of £3540, the purchase-money of the lands of Neilstown, and all the moneys credited to the current account of the defendant William J. Yourell with the plaintiffs for the proceeds of the lettings of the lands included in the said indenture of mortgage, and two sums of £18 and £10, compensation for labourers' plots credited in said account, are to be included in the principal moneys already recovered under the said indenture.

I shall reserve costs, and certify for discovery.

June 22.

The making up of the judgment was postponed at the request of the parties, to enable them to consider whether it was necessary that any, and if so, what form of account should be taken, and, on this day after hearing counsel, the following decree was made:—

> This Court doth declare that no greater principal sum than £5700 was recoverable on foot of the indenture of mortgage in the pleadings mentioned, dated the 28th day of November, 1899, and made between the defendants and the plaintiffs, and that the plaintiffs are not entitled, as against the lands comprised in the said indenture, to any further sum by way of salvage; and doth further declare that the purchase-moneys of the lands of Neilstown, being portion of the lands comprised in the said indenture of mortgage, which were received by the plaintiffs, and the sums from time to time lodged with the plaintiffs by Patrick Leonard, the receiver appointed by them over the rents and

profits of the lands and premises comprised in the said indenture of mortgage, together with the sums of £18 and £10, received by the plaintiffs as compensation for portions of the lands comprised in the said indenture of mortgage, taken pursuant to the provisions of the Labourers (Ireland) Acts, having been credited by the plaintiffs as principal moneys in their account with the defendant William J. Yourell, credit must be given for the same against the principal moneys secured by the said indenture of mortgage; and all the defendants, by their respective counsel, admitting that at the date of the issue of the writ in this action there was due to the plaintiffs, upon the security of the said indenture of mortgage, the sum of £293 14*s.* 5*d.* in respect of principal, with interest upon the said sum from the date of the issue of the writ, and the plaintiffs, notwithstanding the foregoing admission of the defendants as to the amount due to the plaintiffs, asking for an account, it is hereby ordered that it be referred to Chambers to take the following account, that is to say:—

An account of what is due to the plaintiffs for principal and interest and costs on foot of the said indenture of mortgage, dated the 20th day of November, 1899, made between the defendants and the plaintiffs, regard being had to the declarations aforesaid; and the Court doth adjourn the further consideration of this action and the question of costs, and the judge doth certify for discovery.

W. L.

The plaintiffs appealed to the Court of Appeal (1).

Serjeant Matheson K.C., and *Herbert Wilson K.C.* (with them *Leonard*), for the appellants:—

We contend that the bank is entitled, in addition to the principal sum of £5700 secured by the mortgage, to claim against the lands remaining unsold for all sums of money paid by way of salvage, and also that the sums lodged by the receiver appointed over the lands comprised in the mortgage ought not, in the taking of the account, to be credited against the principal sum secured by the mortgage. The main question is as to the date when the current account of William J. Yourell in the bank ceased to be operative. We say it was closed on the 30th June, 1904, the end of the last half-year in which any lodgment was

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN L.C., CHERRY L.C.J., and MOLONY L.J.

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made by him. We admit the account should not have been kept as it was, nor should the dockets have been furnished to the customer each half-year; but this was done solely as a record of the transactions which took place. When the customer was forbidden to draw cheques, and did not attempt to do so, and lodged no money to his credit, the account was inoperative and closed: *Stewart* v. *Stewart* (1); *Berry* v. *Halifax Commercial Banking Co., Ltd.* (2). In any case the current account was closed on the appointment of the receiver. The account should, accordingly, now be taken, as from the date when the current account ceased to be operative, as an ordinary mortgagee's account, with no capitalization of interest each half-year. The amounts of the salvage payments made by the bank were, no doubt, brought into the current account, but there should now be an inquiry as to what salvage payments were, in fact, made; these should be allowed as charges against the lands remaining unsold, and the amounts thereof should not be brought into the account of the principal moneys secured by the mortgage.

As to the amounts handed over to the bank by the receiver, we say these should not be credited against the principal. The receiver was bound to apply them in the manner prescribed by sect. 24 (8) of the Conveyancing Act, 1881; he could not delegate his duties to the bank, and the latter had no power to apply any of these moneys in reduction of the principal secured by the mortgage in a manner in which the receiver could not. The bank are not estopped from now contending this; there can be no estoppel against an Act of Parliament. If the account be now taken on the above basis, the amount claimed by the bank will not be in excess of the limit of £5700 imposed by the mortgage.

[They referred to *Kepitigalla Rubber Estates, Limited* v. *National Bank of India* (3); *Bank of England* v. *Vagliano Brothers* (4); *Crosskill* v. *Bower* (5); *Mosse* v. *Salt* (6); *Lord Clancarty* v. *Latouche* (7); *Daniell* v. *Sinclair* (8); *Barfield* v. *Loughborough* (9).]

(1) 27 L. R. Ir. 351.
(2) [1901] 1 Ch. 188.
(3) [1909] 2 K. B. 1010.
(4) [1891] A. C. 107.
(5) 32 Beav. 86.
(6) 32 Beav. 269.
(7) 1 Ball & B. 420.
(8) 6 A. C. 181.
(9) L. R. 8 Ch. 1.

S. L. Brown K.C. (*M'Cormack* with him) for the respondents, other than W. J. Yourell:—

Our clients are entitled to the rights of sureties, and we contend that the accounts as kept by the bank cannot now be re-cast to their prejudice. This is not a case of a mortgage to a bank for a fixed amount at a fixed rate of interest, the account of which must be kept separate from the ordinary banking account; it is a case of a mortgage securing the balance from time to time due by the customer on all the accounts which the bank has against the customer. So long as the relationship of banker and customer existed, the accounts which governed the transaction to show the amount for the time being due on the mortgage were the several accounts kept by the bank. If the account had been closed, the mortgage would thereupon have become a mortgage for a fixed amount, namely, the amount *then* appearing to be due on foot of the several banking accounts, and as from that date the account would have become an ordinary mortgage account. In the present case, however, the current account was not closed before action brought. There can be no stronger evidence of the relationship of banker and customer than the fact that the bank were continuing to add up compound interest, entering items on the debit and credit side, furnishing to the customer his pass-book, and half-yearly dockets for signature, and honouring cheques drawn by the customer, no doubt at the request of the bank, for payment of outgoings. In *Parr's Banking Company* v. *Yates* (1) the account was held still open, although the customer had not been allowed an advance for more than six years prior to the action. We contend, therefore, that there is no mortgage account to be taken as distinguished from the banking accounts given in evidence by the bank. In *Johnson* v. *Bourne* (2), Sir J. Knight Bruce V.-C. said:—"I must hold that any principal money, or payment on account of principal money, or applicable as principal money, which was received by the mortgagees by means or virtue of the security, whensoever received, must be applied to cut down and reduce the £5800" (the principal). We contend, accordingly, that W. J. Yourell is entitled to credit against the principal

(1) [1898] 2 Q. B. 460. (2) 2 Y. & C. C. C. 268.

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secured by the mortgage for all moneys received or recovered by the bank under and by means of the mortgage, including the sums handed to them by the receiver. The effect of the decision in *Johnson* v. *Bourne* (1), and of the mode in which the current account was kept, was that every lodgment to credit of that account went in discharge of the principal moneys due under the mortgage, and in reduction of the limit recoverable for principal under the mortgage. The bank is not entitled as against the defendants to re-open and re-cast their accounts either generally or with reference to the so-called salvage payments, or to moneys realized by the receiver. They have appropriated all the payments to the current account, and communicated this to the debtor, and they are bound by their own accounts. We rely on no estoppel against the bank. On the contrary, we say that the bank has told the truth, and are bound by it.

Carrigan K.C. (*J. H. Russell* with him), for the defendant W. J. Yourell.

[The following cases were also referred to:—*Kinnaird* v. *Webster* (2); *Hooper* v. *Keay* (3); *Deeley* v. *Lloyd's Bank, Ltd.* (4); *Bank of Scotland* v. *Christie* (5).]

Serjeant Matheson K.C., in reply.

Cur. adv. vult.

1916. Jan. 25.

SIR IGNATIUS J. O'BRIEN L.C.:—

I have had the advantage of reading the judgment of Molony L.J., with which I concur.

CHERRY L.C.J.:—

Although I have come to the conclusion that the judgment of O'Connor M.R. in this case was correct, and have the misfortune to differ from the view adopted by the Lord Chancellor and Molony L.J., it will not be necessary for me to occupy public time by discussing the authorities at length. My difference from their view is not upon any question of law, but upon a pure question of fact; but it is a question of fact which goes to the

(1) 2 Y. & C. C. C. 268.
(2) 10 Ch. D. 139.
(3) 1 Q. B. D. 178.
(4) [1912] A. C. 756.
(5) 8 Cl. & F. 214

root of the matter; namely, when (if at all) was the current account of the defendant, William J. Yourell, with the Hibernian Bank closed?

Serjeant Matheson, for the plaintiffs, urged, most confidently, that the banker and customer account of William J. Yourell was closed by the refusal of the bank to honour his cheques in April, 1904, or by the appointment of the receiver on December 17th, 1904. He seemed to think that it did not matter which of these events was relied upon as closing the account, but he admitted, and I think that it is agreed on all sides, that the appeal by the bank cannot succeed if the current account is to be treated as open down to the commencement of this action.

Now, on examining the account, a copy of which has been furnished to us, I find that it was regularly kept as a current account by the bank down to the year 1915, and that in every half-year after 1904 there were entries both on the debtor and creditor side of the account. Most of the items entered were connected with the lands included in the mortgage of 1899, but there were others also, as, for instance, payments each half-year of premiums on an insurance upon the life of William J. Yourell, which had no connexion with the mortgage at all. So that it would be impossible for the bank to contend that the account was in some way transformed from a current account into a mortgage account.

Not only was the account regularly kept by the bank as an ordinary current account, but details of it were regularly entered in the customer's pass-book and furnished to him—not, I may observe in passing, to the other mortgagors. At the end of each half-year Mr. Yourell was sent with his pass-book a docket, which he was asked to sign and return, stating that he had examined the pass-book; that the account showing a debit balance against him was correct; and acknowledging that he owed that amount to the bank. This statement he regularly signed down to the year 1914. Yet we are asked to hold that this account, in which no error is shown to exist, does not in any way bind the bank, and that they may repudiate it altogether, and furnish a new account on an entirely different basis, when they find it to be to their financial advantage to do so.

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The correspondence, which is in evidence, between the general manager of the bank in Dublin and the local manager of the bank in Navan, between the years 1904 and 1913, all along treats this account as an ordinary open current account. Mr. Brown read several of these letters. I need only read one, which is the most important, and the last, namely, that written by Mr. Goodwillie to the manager at Navan on 18th January, 1913, which is in the following terms :—

Re WILLIAM J. YOURELL.

DEAR SIR,

Referring to this case you will now please charge out to the current account the interest on joint promissory notes £2500 quoted in above account from their due dates up to the 30th June, 1904, crediting the amount to the suspense interest account in your current account ledgers. The amount would, we calculate, be about £73, the interest to be at 5 per cent. On this being done you will credit to Mr. Yourell's account the sum £216 7*s.* 10*d.* advised for credit of your branch to-day, this amount being the proceeds received from Mr. Leonard, receiver, in respect of lettings for last season, as per particulars on other side.

Yours faithfully,

For the General Manager,

H. GOODWILLIE.

It is argued that the account referred to in that letter had been dead for nine years; if so, it was a very lively corpse, indeed.

Having come to the conclusion that the current account between W. J. Yourell and the bank remained an open one down to the commencement of this action, the decisions of the Master of the Rolls on the two points which are raised in this appeal follow as logical conclusions.

The first point has reference to what are called the salvage payments. These were payments by the bank of various sums for rent and costs due out of lands included in the mortgage of 1899, which were necessary to protect the lands from eviction. These might have been treated as ordinary salvage claims, but they were not. They were debited to Mr. Yourell's current account, and treated as advances made to him to enable him to discharge them himself. Indeed, in several cases, these sums were paid by cheques

signed by Mr. Yourell, and honoured by the bank under the special circumstances. The bank were entitled to be repaid these sums, but they have been repaid by the current account coming into credit, as it subsequently did. By treating them as advances to Mr. Yourell, they have had the advantage of being paid compound interest for a number of years, and they ought not now to be allowed to mend their hands, and treat them as moneys still due.

It follows, also, as a logical conclusion, if the account is taken to be an open current account down to the commencement of the action, that the payments into it of the balance of the receiver's accounts from year to year must be taken to be payments on a capital account, and in discharge of the principal sum secured by the mortgage. For the principal sum due upon the mortgage is the amount of the overdraft from time to time. Every payment, therefore, made into the current account must, *pro tanto*, reduce the amount due on the mortgage. It is said that the receiver was bound by sect. 24, sub-s. 8, of the Conveyancing Act, 1881, to apply these moneys in discharge of interest, and that he could not legally appropriate them to the capital account. The answer to this is, that it was not the receiver, but the bank, that made the appropriation. At the time of the payments by the receiver there was a much larger sum due to the bank for interest on the bills, which at that time were not brought into the current account, and the receiver was therefore quite right to pay over the money to the bank. But the placing of it to the credit of the current account, instead of applying it to the payment of interest on the bills, was the act of the bank. The customer, Mr. Yourell, was regularly informed of this method of dealing, and approved of it by signing the half-yearly dockets. The bank, in my opinion, ought not now to be allowed to repudiate it, having discovered that another arrangement would be more advantageous to them.

For these reasons, I am of opinion that the judgment of the Master of the Rolls upon the two matters upon which this appeal has been taken is right, and ought to be affirmed.

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MOLONY L.J. :—

By his decree of the 22nd June, 1915, the Master of the Rolls declared that no greater principal sum than the sum of £5700 was recoverable on foot of the indenture of mortgage in the pleadings mentioned, dated the 20th November, 1899, and made between the defendants and the plaintiffs, and that the plaintiffs are not entitled, as against the lands comprised in the said indenture, to any further sum by way of salvage; and he further declared that the purchase-moneys of the lands of Neilstown, being portion of the lands comprised in the said indenture of mortgage, which were received by the plaintiffs, and the sums from time to time lodged with the plaintiffs by Patrick Leonard, the receiver appointed by them over the rents and profits of the lands and premises comprised in the said indenture of mortgage, together with the sums of £18 and £10 received by the plaintiffs as compensation for portions of the lands comprised in the said mortgage, taken pursuant to the provisions of the Labourers (Ireland) Acts, having been credited by the plaintiffs as principal moneys in their account with the defendant, William J. Yourell, credit must be given for same against the principal moneys secured by the said indenture of mortgage. The Master of the Rolls referred the matter to chambers to have an account taken of what was due to the plaintiffs for principal, interest, and costs on foot of the said indenture of mortgage, regard being had to the aforesaid declarations.

The plaintiffs have appealed from so much of the order as declares that the plaintiffs are not entitled to any further sums by way of salvage in addition to the principal sum of £5700, and also from so much of the order as declares that the sums from time to time lodged with the plaintiffs by the receiver appointed over the rents and profits of the lands and premises comprised in the said mortgage must, on the taking of an account of the moneys due to the plaintiffs for principal, interest, and costs, be credited against the principal moneys secured by the said indenture of mortgage.

The questions at issue will be determined by ascertaining the date on which the current account of the defendant William J. Yourell was closed.

It is contended on the part of the plaintiffs that this account was closed on the 30th June, 1904, while, on the part of the defendants, it is argued that the account was a continuing and operative one down to the date of the commencement of the action. It is admitted on the part of the defendants that once the account is closed the mortgage thereupon becomes a mortgage for a fixed amount, which is the amount then appearing to be due on foot of the several banking accounts, and, as from that date, the account becomes an ordinary mortgage account.

At the time of the execution of the mortgage the defendant William J. Yourell was indebted to the bank in a considerable sum on foot of his current account, and he was also indebted on certain bills. The indebtedness increased from time to time until the 30th June, 1903, when it appeared that there was £2949 1*s.* 6*d.* due on the current account, and an outstanding liability on foot of bills to the extent of £3600, making together the sum of £6549 1*s.* 6*d.*

The bank then, remembering that they were only secured to the amount of £5700, required the said defendant to reduce his liability on foot of the current account by at least £800.

Between the 21st December, 1903, and the 4th January, 1904, the said defendant made three lodgments, amounting in all to £550, but failed to lodge the balance. Various excuses were made by him to account for the non-lodgment, but, on the 3rd March, 1904, Messrs. D. & T. Fitzgerald, the solicitors for the bank, wrote to Messrs. Terence O'Reilly & Sons, the solicitors for the defendants, that they were instructed that, as the promised payment had not been made, the directors had decided that the debt must be called in, and the security realized.

Messrs. O'Reilly, in their letter of the 5th March, 1904, put forward another excuse; but, on the 16th March, 1904, Messrs. D. & T. Fitzgerald wrote to them that they had received final instructions to have the security realized, and that they proposed to institute proceedings in the Court of Chancery to have the property sold and a receiver appointed.

On the same day Messrs. Fitzgerald wrote to each of the defendants to the same effect.

On the 15th April, 1904, Mr. Yourell represented to the bank

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that it would be ruinous to sell Neilstown just then, and asked for facilities to get the use of money from week-end to week-end, in order to enable him to deal in stock.

On the 19th April, 1904, Messrs. O'Reilly & Son wrote to Messrs. D. & T. FitzGerald, saying that in the interests of the bank, as well as of their client, it would be better not to force a sale at present, and that they therefore suggested that the bank should allow matters to rest as they were until November, and that Mr. Yourell would undertake to sell Neilstown in November, if the bank then so required, and hand over the proceeds, less costs of sale, to the bank. On the 25th of April, 1904, Messrs. D. & T. FitzGerald wrote to Messrs. O'Reilly & Son that the matter might be allowed to remain over until the following November, on the understanding that Mr. Yourell would in the meantime undertake to realize the farm of Neilstown, and hand over the proceeds to the bank, but that with reference to Mr. Yourell's proposal that he should get the use of some money from week-end to week-end, they were instructed to say that the directors did not see their way to make any advance beyond the present amount of the debt. When November came round, the position was this—Mr. Yourell had made no effort to sell Neilstown; no cheque of his drawn since the 18th April, 1903, had been honoured, except cheques drawn at the request of the bank to pay rent, rates, and certain taxes. No lodgment had been made by him since the 4th January, 1904, but in the meantime the bank had to pay the rent, rates, and taxes, with the result that upon the 17th December, 1904, there was due to the bank £3196 13*s.* 10*d.* on the current account, and £3600 on the bills account, making together the sum of £6796 13*s.* 10*d.*, of which only £5700 was secured by the mortgage.

The bank, by deed poll of that date, after reciting the mortgage, and that the sum of £5700 secured by it remained due, appointed Mr. Patrick Leonard receiver, with all the powers conferred on a receiver by the Conveyancing and Law of Property Act, 1881, and "to the intent that he shall apply all moneys received by him in the manner directed by sub-sect. 8 of sect. 24 of the said Act, save that the said Patrick Leonard shall be at liberty, and is hereby authorized, to permit the said Francis

Yourell and Denis Yourell to retain possession of the dwelling-house and offices on Piercetown lands, and the paddocks adjoining the said premises, and containing in all about eight acres, for their own use, and save that the said Patrick Leonard shall pay to the said Francis Yourell and Denis Yourell the sum of £8 per month from the date hereof out of the proceeds of the letting of the said lands of Piercetown aforesaid, and shall also pay to Messrs. Mooney & Son, solicitors for said Wm. J. Yourell, the sum of £10 on account of their costs connected with this deed, and the negotiations leading up to same."

This deed was approved of on behalf of all the defendants by Messrs. Mooney & Son, and the special provision above referred to was inserted at their request in order to make some provision for the family during the time that the receiver would be in possession, and pending the sale or redemption.

Now, what was the position of the bank after the appointment of the receiver? The deed treated the account as closed, and the principal sum of £5700 as due on foot of it. The duty of the receiver was to keep down the interest on the said principal sum, first, however, discharging the outgoings and providing the £8 a month for the family. The receiver paid the £8 a month, but immediately on his appointment he was pressed to pay outgoings, and had no funds to pay. The bank thereupon paid them in the year 1905, debited them in William J. Yourell's account, and subsequently, in December, 1905, credited the same account with the amount received from the receiver. The receiver in the ordinary course ought to have paid these outgoings (as he did in subsequent years), and taken credit for them in his account, and there would be no difficulty in adjusting the amounts in an ordinary mortgage account.

The defendants, however, contend that an ordinary mortgage account cannot now be taken, because the bank did not formally close the current account. In effect the defendants say that, while they are entitled to the benefit of the deed as regards the £8 a month, they are in a position legally to object to the receiver and the bank applying the surplus rents and profits in the manner directed by the deed.

It appears that in the books of the bank the account was con-

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tinued, and half-yearly balances were brought forward, and there was debited to the account the amount which the bank had to pay in respect of the outgoings of the lands, and the various sums brought in by the receiver were credited to the account. It is suggested by the defendants that the account having been continued in this manner the bank are not now entitled to claim that an ordinary mortgage account should be taken.

The right to charge compound interest is incidental to the continuance of the relationship of banker and customer, and once an account is closed the relationship of banker and customer ceases, and that of debtor and creditor ensues.

What closes a bank account has been discussed in a number of cases. It is closed by death: *Williamson* v. *Williamson* (1); or by the customer assigning his estate to trustees for the benefit of his creditors: *Croskill* v. *Bower* (2); or by any act, either of the customer or the bank, which necessarily implies that the relationship of banker and customer can no longer exist.

In *Berry* v. *Halifax Commercial Banking Co., Ltd.* (3) a customer mortgaged to the bank a policy of assurance on his life to secure the amount from time to time owing by him to the bank on account current. The mortgage provided that the statutory power of sale should be exercisable by the bank if (amongst other events) default should be made in payment of the bills owing for the space of one calendar month after the current account had been closed. On the 9th November, 1899, the customer wrote to the bank manager stating that there had been a meeting of his creditors the previous day, and that they had agreed to accept all the assets he had if there was a trustee appointed, and he trusted that everyone would get 20*s.* in the £. On the 18th December, 1899, the bank sold the policy under their power of sale, and it was held that the latter amounted to a closing of the account, and that the bank were justified in realizing their security. Mr. Justice Kekewich said:—"It seems to me that the mortgagor closed the account himself; or, if he did not actually close it, he recognized that it must be closed. There was nothing more to be done. It was said that the bank after that might have honoured his cheques. They might, of course, but one must not suppose

(1) L. R. 7 Eq. 542. (2) 32 Beav. 86. (3) [1901] 1 Ch. 188.

such a foolish thing as that. It is absurd to suppose that after that letter they would have honoured his cheques, and that is really the only way in which the account could be kept open."

It was contended here on behalf of the bank, with considerable force, that the account must be taken as closed as from the 30th June, 1904—(1) because the defendants had got notice on the 16th March, 1904, from the plaintiffs' solicitors that they were instructed to institute proceedings in the Chancery Division to have the property sold and a receiver appointed; (2) because no subsequent lodgment was made, and the defendants had specific notice that no cheque would be honoured; and (3) that the defendants knew that the account was in fact closed, and had not drawn cheques upon it since the 18th April, 1903—more than a year previous—except certain cheques drawn at the request of the bank to discharge outgoings. On the other hand, the bank had agreed to allow the matter to remain over until November, 1904, if Mr. Yourell undertook to sell Neilstown, and it may reasonably be contended that the account would be deemed open in the meantime.

The bank treated the defendants with great consideration, and even when Mr. Yourell made default in November, they did not at once take proceedings to realize their security. This may have led the defendant William J. Yourell to hope that he might still be able to get a little more money out of the bank, because in the same month we find him writing to ask the bank to honour his cheque for £2 10*s.* to pay men's wages, but on the 22nd November, 1904, the managing director replied that the request could not be acceded to. The managing director did not in express terms say that the account was closed, but whatever doubt there might be on this point was removed by the appointment of the receiver in the following month, which, to my mind, ascertained the amount due, and negatived the continuance of a current account.

The defendants, however, say that the account having been continued by the bank in their books as if it were a current account, they cannot now assert that the account closed at the earlier date.

In the view which I take of this case, it was the duty of the

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bank in 1904 to start a mortgagee account between the defendant and the bank, but although the bank made a mistake in treating the account as still current, and in charging compound interest, there is nothing that I can see to prevent the mistake being rectified.

It would of course be different if the defendants had altered their position in any way on the faith of the correctness of the account appearing in the books of the bank, but no alteration of circumstances was proved, or even suggested, in the present case.

It was, I think, clearly understood by both parties after 1904 that William J. Yourell's account in the bank was no longer current. In 1909 we find him pressing the bank to give him an occasional overdraft in order to be in a position to purchase stock, and the directors, on the 6th August, 1909, authorized an occasional overdraft up to £200. They did not, however, treat the old account as existing, but required him to open a new account in the Dublin office, and on this account there is now due to the bank the sum of £240.

In *Daniell* v. *Sinclair* (1), where a mortgagee account had been settled on foot of compound interest, with half-yearly rests, both parties wrongly understanding the mortgage-deed to require same, it was held that the account might be re-opened.

Great reliance was placed by the defendants on the case of *Johnson* v. *Bourne* (2), and it was apparently on the authority of this case that the Master of the Rolls decided that every payment made by the receiver and brought into the current account was a payment on account of principal, and recovered under the mortgage. An examination of this case, however, clearly shows that it has not the far-reaching effect contended for by the defendants. In that case, a person having purchased an estate for the purpose of building upon it, mortgaged it to a Joint Stock Banking Co., to secure sums then due, and all sums whatever to become due from him to them on any banking or other account whatever, "so as the whole amount of principal moneys to be ultimately recovered or recoverable by virtue of that security should not exceed the sum of £5800, together with interest." By the mortgage deed, a power

(1) 6 A. C. 181. (2) 2 Y. & C. C. C. 268.

of sale was given to the bank by the mortgagor. The mortgagor built three houses on the lands, which were successively sold to different purchasers, and the purchase-moneys were not paid to the mortgagor but to the bank, who gave the mortgagor credit for them in his account. It was held that the sums were recovered by the bank by virtue of the mortgage security, and, so far as they were applicable as principal moneys, must be considered as received by them in discharge of the said sum of £5800, and not merely on the general account between them and the mortgagor. That case would be analogous to the present one if the bank were here seeking to apply any money they received under the security in discharge of the moneys due to them for principal over and above the sum of £5700, but it has no application to the facts of the present case.

In *Johnson* v. *Bourne* (1), the Vice-Chancellor said:—"I must hold that any principal money, or payment on account of principal money, or applicable as principal money, which was received by the mortgagees by means or virtue of the security, whensoever received, must be applied to cut down and reduce the £5800."

Rents and profits of lands are not applicable as principal money, because, under the provisions of section 24 of the Conveyancing Act, they are applicable to the payment of interest. The entire purchase-money of part of the mortgaged premises is not so applicable, because the interest due is payable in the first instance out of the proceeds of the sale, and only the residue goes in reduction of the principal.

On the whole case, I am satisfied that the current account is to be taken as closed when the receiver was appointed on the 17th December, 1904.

There is no necessity for making a specific declaration as regards the alleged salvage payments. Such of these payments as were made before the 17th of December, 1904, cannot be recovered, because they are included in the total amount due to the bank, in respect of which only £5700 was secured. Such of these payments as have been made since that date can be properly dealt with when taking the mortgage account, and credit claimed as outgoings.

(1) 2 Y. & C. C. C. 268.

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I am therefore of opinion that the declarations made by the Master of the Rolls, other than the declaration that no greater principal sum than £5700 was recoverable on foot of the indenture of mortgage, should be discharged, and that we should further declare that the account should be taken on the basis that the current account was closed on the 17th December, 1904.

The only remaining question to be dealt with is the question of costs. This litigation has been to a great extent caused by the mistaken way in which the bank kept the accounts, and it was expressly admitted by the counsel for the bank that the amount which they claimed to be due in their letter to the defendant of the 16th December, 1912, was calculated on a wrong basis, and that the amount which they claimed in their statement of claim was also calculated on a similar wrong basis. Under these circumstances, I think that the bank must abide their own costs of the action up to the present, and of this appeal, and of course the costs to be incurred in the taking of the accounts and of the subsequent proceedings will be in the discretion of the Master of the Rolls.

Solicitors for the appellants: *D. & T. FitzGerald.*
Solicitors for the respondents: *T. O'Reilly & Sons.*

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March 21,
May 23.

Marriage Settlement — Wife's Fortune paid to Husband — Settlement of Husband's Property—Limitation to Husband for life determinable on Insolvency—Trust to pay a sum of money to Wife out of proceeds of sale of Husband's Property in the event of his becoming insolvent—Valid Trust to the extent of the Wife's Fortune.

A trader by marriage settlement dated Feb. 10, 1897, and in consideration of £500 paid to him as his wife's fortune, assigned to trustees the premises in which he resided and carried on business, together with the goodwill of the business, stock-in-trade, and trade debts (including future acquired property), on trust "for and during his life, or until he should become bankrupt or become insolvent in his circumstances, or effect or attempt to effect a composition with his creditors, or have judgment marked against him, or do or suffer any act, deed, or thing whereby the property might, if belonging absolutely to him, become vested in or payable to any person or persons"; and from and after the determination of the trust in his favour upon trust to enter upon and sell the trust property, and out of the proceeds of sale to pay the trade debts then due (i.e., at the date of the settlement); and in the next place to pay to his wife, if living, the sum of £1000 for her separate use, and to pay the surplus (if any) to him, his executors, administrators, and assigns.

The settlor also assigned to the trustees a policy of insurance on his own life for £500 upon trust out of the proceeds to pay to his wife, if surviving, the deficiency (if any) in the sum of £1000 to be paid to her out of the trust property, and to hold the residue in trust for the settlor, his executors, administrators, and assigns.

The settlor carried on the business on the premises until 1913, when he was declared by order of the Lord Chancellor a person of unsound mind, and his wife was appointed committee of his person and estate, and authorized to carry on the business. It was then found that the settlor had become insolvent. It became necessary to determine what were the legal rights against the settlor's assets of his creditors and of his wife, and a summons to determine them was accordingly taken out.

Held, (1) that the trust to raise £1000 for the wife in the event of her husband's insolvency was only valid to the extent of £500, the amount of her fortune paid to him; and (2) that the claim of the wife to the extent of £500 took priority so far as the settled property was concerned over the general creditors of the husband.

Casey's Trusts, 4 Ir. Ch. R. 247, followed.

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ORIGINATING SUMMONS.

The following statement of facts is taken from the judgment of O'Connor M.R.:—

Martin Doherty married Teresa Power in the year 1897. The lady had a fortune of £500, which was given to her husband, and a settlement was executed on the marriage. It is dated the 19th February, 1897, and made between Martin Doherty of the first part, Maurice Power of the second part, Teresa Power (daughter of the said Maurice Power) of the third part, and David Murphy and Maurice Power, as trustees, of the fourth part. It recites a lease of certain premises in the town of New Ross, which was then vested in Martin Doherty. It recites that he carried on the business of a grocer and publican in the premises, and that the stock-in-trade, fixtures, furniture, and other property in and upon the said premises, and the debts belonging to the business, were his absolute property. It also recites that he had a policy of assurance on his life for the sum of £500 effected with the Edinburgh Life Assurance Company. It recites the intended marriage between Martin Doherty and Teresa Power, and that it had been agreed that the business premises, the goodwill of the business, stock-in-trade, furniture, and other property and debts, and the policy of assurance should be put in settlement. It then recites that Maurice Power, in consideration of the settlement, had agreed to pay to Martin Doherty the sum of £500 as the marriage portion of his daughter Teresa Power. The settlement then witnesses that in consideration of the marriage, and the payment of the fortune, Martin Doherty assigned to the trustees the said premises, to hold for the residue of the term of ninety years, for which the same were held, upon the trusts thereinafter declared; and it also witnesses that Martin Doherty assigned to the trustees all his beneficial interest and goodwill in the said trade or business, and also all book and other debts then due and owing to him on account of the said business, and all the stock-in-trade, goods, articles, and things which belonged to him on account of the said business, subject, however, to the trade debts then due or owing in connexion with the said trade or business, and all household furniture and effects then in and upon the dwellinghouse, shop, and

premises, and also all book or other debts which at any time during the continuance of the trusts of the settlement should be due and owing to him on account of the said business, wheresoever the same might be carried on, and all securities for the same, and also all the stock-in-trade, goods, fixtures, articles, furniture, effects, and things which might at any time during the continuance of the trusts of the settlement belong to the said Martin Doherty on account of the said trade or business, or be in or upon or belonging to the said dwellinghouse or shop, and all other premises which the said Martin Doherty might thereafter occupy, to hold to the trustees upon the trusts thereinafter declared, and it was declared that the trustees should stand possessed of all the property aforesaid upon trust to permit and suffer Martin Doherty to use and occupy the said dwellinghouse, shop, and premises, and to make sale of and manage the said stock-in-trade, and to receive the aforesaid debts, and to take for his own use and benefit the entire profits derivable therefrom for and during his life, or until he should become bankrupt, or become insolvent in his circumstances, or effect or attempt to effect a composition with his creditors, or have judgment marked against him, or do or suffer any act, deed, or thing whereby the property or any part thereof might, if belonging absolutely to him, become vested in or payable to any person or persons, and on the death of the said Martin Doherty, or the sooner determination of the trust in his favour thereinbefore contained, then upon trust that the trustees or trustee should enter into possession of the premises, stock-in-trade, and other property for the time being, subject to the trusts thereinbefore expressed, and should collect and receive the debts and other moneys then due and owing to the said Martin Doherty, and should sell and convert into money the said premises, stock-in-trade, and other property as aforesaid as therein mentioned. And it was declared that the stock-in-trade, goods, fixtures, debts, securities, furniture, effects, and things which might at any time during the continuance of the trusts of the said settlement belong to the said Martin Doherty on account of the said business wheresoever the same might be carried on should be included in the said settlement, and be subject to the trusts, powers, licences, declarations, and covenants therein contained, and upon the death

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of the said Martin Doherty, or other sooner determination of the trusts in his favour thereinbefore contained, it should be lawful for the trustees or trustee at any time during the continuance of the trusts of the settlement to enter upon any premises of the said Martin Doherty, or used or occupied by him, or upon which the stock-in-trade or other property thereby assigned should be, for the purpose of taking possession thereof, and it was declared that the trustees should hold the moneys to arise from such sale or conversion as aforesaid upon trust in the first place to indemnify themselves against all costs and expenses, and to pay the trade debts which were then (that is, at the date of the settlement) due and owing in connexion with the said trade or business, and, in the next place, if the said Teresa Power should be living at the death of the said Martin Doherty, or upon other sooner determination of the trusts in his favour, to pay to the said Teresa Power the sum of £1000 for her sole and separate use, and to pay the surplus, if any, to the said Martin Doherty, his executors, administrators, and assigns.

By the settlement it was also witnessed that Martin Doherty assigned to the trustees the policy of assurance on his life, and all moneys to become payable thereon upon trust for the said Martin Doherty until the marriage, and after the marriage upon trust that the trustees and the survivor of them should upon the death of Martin Doherty receive the policy moneys, and if the said Teresa Power should then be living, and should not have been previously paid under the trusts thereinbefore declared, should pay to the said Teresa Power the moneys received by them on foot of the said policy, or so much thereof as might be required to make up for the said Teresa Power the sum of £1000 after crediting what might have been paid out of the proceeds of the sale thereinbefore mentioned, and should hold the residue in trust for the said Martin Doherty, his executors, administrators, and assigns. Then follows a covenant by the said Martin Doherty for the payment of the premiums on foot of the said policy.

After the marriage the husband continued to carry on the business without any interference on the part of the trustees. The policy of assurance has been kept up.

On the 20th December, 1913, Martin Doherty was by order

of the Lord Chancellor declared to be a person of unsound mind, and by a subsequent order, dated 18th February, 1914, his wife Teresa Power, otherwise Doherty, was appointed the committee of his person and estate, and was authorized to continue to carry on his business. It was then found that Martin Doherty's financial position was very embarrassed, and under the direction of the Lord Chancellor a balance sheet showing his liabilities and assets was made out. It appears from the balance sheet that the liabilities amount to £2721 1*s.* 8*d.*, part of which, £1591 19*s.* 7*d.*, is a debt due to the Bank of Ireland; and that his assets, including debts due to the business, stock-in-trade, the leasehold premises, the policy of assurance, and cash in hand, are value for only £1858 18*s.* 6*d.*, leaving a deficit of £862 3*s.* 2*d.* This includes the entire estate of Martin Doherty, and it is manifest that he is insolvent. Indeed, he is much more insolvent than appears from the balance sheet, because he is credited with the full value of the leasehold premises and the policy as if he owned them absolutely; whereas, no matter what view of the settlement is taken, these two items at least are liable to make good on his death the sum of £1000. In these circumstances, it became necessary to determine what are the legal rights against the assets of Martin Doherty of his creditors, and of his wife Teresa Doherty, and, accordingly, with the consent of the Lord Chancellor, a summons was taken out to have the following questions decided:—

1. In the events that have happened, whether Teresa Doherty is entitled to call on the trustees to enter, on the ground that Martin Doherty has become insolvent in his circumstances or otherwise, and if she is entitled to rank as to the sum of £1000 mentioned in the said settlement in priority to, *pari passu* with, or after the ordinary trade creditors of the said Martin Doherty;

2. If she is entitled to rank as to the sum of £500 mentioned in the said settlement in priority to, *pari passu* with, or after the ordinary trade creditors of the said Martin Doherty; and

3. Provision for the costs.

The parties to the summons were Teresa Doherty, the wife of Martin Doherty, plaintiff, and Maurice Power, the surviving trustee of the settlement, and the Governor and Company of the Bank of Ireland as representing the general creditors, defendants.

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Cecil Eforde, for the plaintiff:—

A limitation over on bankruptcy of a husband of his own property is void except to the extent of the wife's fortune. In other cases the limitation over is good. The word "insolvent" has no technical meaning; it only means "a person who is unable to pay his debts." *Re Muggeridge's Settlement* (1). Insolvency is not the same as bankruptcy. There is no vesting of the debtor's property in assignees for the benefit of creditors. *Casey's Trusts* (2), before Brady L.C., may be relied on. It was there held that a limitation in a settlement of the settlor's own property to himself for life, or until he should become insolvent, with a provision that it should go over on his insolvency, was not valid. The wife in that case did not bring anything into settlement; she had predeceased her husband, and there was a limitation over in favour of the children. The husband had executed a trust deed for the benefit of his creditors, and conveyed his interest in certain annuities to the trustees of the deed, and the contention was between the trustees and the children. *Phipps* v. *Ennismore* (3) there cited was a case of gross fraud. Brady L.C. said that there was no reported case directly in point, and relied on an unreported case of *Ferguson* v. *Byrne*. The only other Irish case is *In Re Callan's Estate* (4). Flanagan J. there held that the trusts of the marriage settlement in favour of the wife in the event of her husband becoming bankrupt or insolvent were valid as against a subsequent incumbrancer of the husband's life estate to the extent of the value of the wife's fortune. The husband there had received a fortune with his wife, but there was no mention of it in the settlement. *Casey's Trusts* (2) was cited. The husband had effected an arrangement by composition with his creditors under the Irish Bankrupt and Insolvent Act, 1857, 20 & 21 Vict. c. 60. Here there is no deed in favour of creditors. The Bank of Ireland only represents the trade creditors. In *In Re Detmold* (5) the words of the clause were similar to those in the present case, except that the contingency of insolvency was not mentioned. North J. held that a limitation to the wife in the event of an

(1) 29 L. J. Ch. 288.
(2) 4 Ir. Ch. R. 247.
(3) 4 Russ. 131.
(4) 7 L. R. Ir. 102.
(5) 40 Ch. D. 585.

involuntary alienation by process of law of the income in favour of a judgment creditor of the husband was valid as against a trustee in bankruptcy. If that case applied here, forfeiture would take effect. Judgment had been recovered, and a receiver appointed. There may have been a judgment recovered in this case (1). The wife is entitled to £1000, or in any event to £500 in priority to the trade creditors.

Carrigan K.C., for the defendant Power.

Oliver Murphy, for the defendant the Bank of Ireland. He was appointed to represent the trade creditors:—

Casey's Trusts (2) is a direct authority. It was decided on the general law by Brady L.C. *Phipps* v. *Ennismore* (3) was not a case of fraud. Such a deed as this is as much a fraud on creditors in the case of insolvency as in the case of bankruptcy. The authorities are summarized in Vaizey on Settlements, p. 95, and *Casey's Trusts* (2) is referred to. It was followed in *Clarke* v. *Chambers* (4).

As to the cases in which it was held that a settlement of the husband's property in favour of his wife in the event of his bankruptcy was good to the extent of the wife's fortune received by him, in all these cases either a bond was given by the husband to the trustees for the amount of the fortune, and they were admitted to prove in his bankruptcy for the amount of the bond, or the Court gathered from the terms of the settlement that there was an intention to settle the wife's property, although that intention had not been carried out. He referred to *Meaghan a Bankrupt* (5); *Higginson* v. *Kelly* (6); *Ex parte Cooke* (7); *Ex parte Hodgson* (8); *Lester* v. *Garland* (9); *Carr* v. *Carr* (10). There was no intention here to settle the wife's property.

(1) A search was made during the hearing by the solicitor for the defendant Bank, but no judgment had been recovered.
(2) 4 Ir. Ch. R. 247.
(3) 4 Russ. 131.
(4) 8 Ir. Ch. R. 26.
(5) 1 Sch. & Lef. 179.
(6) 1 Ba. & Be. 252.
(7) 8 Ves. 383.
(8) 19 Ves. 237.
(9) 5 Sim. 205.
(10) 3 L. R. Ir. 435.

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Even if the wife is entitled to claim £500, her claim should be postponed to the claims of the trade creditors. The business was being carried on by the husband for the benefit of himself and his wife. The trust estate was devoted to carrying on the business, and must first pay the liabilities before the wife as *cestui que trust* can obtain any benefit. He referred to *Re Johnson* (1); and *Gallagher* v. *Ferris* (2).

Fforde, in reply:—

Mackintosh v. *Pogose* (3) shows that intention to settle the wife's property is not necessary.

O'CONNOR M.R reserved judgment.

May 23.

O'CONNOR M.R., having stated the facts of the case, as hereinbefore set out, proceeded as follows:—

Before dealing with the questions in the summons, the constitution of the matter as regards parties requires some notice. The plaintiff is Teresa Doherty, who has a claim against the lunatic's estate, and she seeks to enforce it. She is also the committee of the person and fortune of the lunatic, and in that capacity she is bound to protect his estate. The defendants are Maurice Power, the surviving trustee of the settlement, and the Bank of Ireland, the lunatic's largest creditor. There is no one before me representing the lunatic. The trustee cannot represent him because he owes an equal duty to every person claiming under the settlement. The interest of the Bank of Ireland in the matter is, however, the same as that of the lunatic. Both are concerned in defeating and reducing the claim of the lunatic's wife against his estate, and I am satisfied that his interest is sufficiently protected, although he is not directly represented. However, the matter has been constituted under the direction of the Lord Chancellor, to whose care the lunatic is confided—and his Lordship is satisfied, as I am, that the lunatic's interest is sufficiently protected.

By the settlement the settlor's own property is settled upon trust for him for life, or until he shall become bankrupt, or insolvent, or effect or attempt to effect a composition with his

(1) 15 Ch. D. 548.
(2) 7 L. R. Ir. 489.
(3) [1895] 1 Ch. 505.

creditors, or have judgment marked against him, or do or suffer any act, deed, or thing whereby the property or any part thereof might, if belonging absolutely to him, become vested in or payable to any person or persons, and on his death or sooner determination of the trusts in his favour, then upon trust to raise £1000 for Teresa Doherty if then living.

I have already pointed out that the insolvency of the lunatic is proved by the balance sheet to which I have referred. The event, therefore, has happened on which the trust in favour of the wife arises under the settlement. That trust must now be performed by the trustee unless it is invalid.

I will first deal with the case as if Martin Doherty were of sound mind and *sui juris*. If he were, and if he were made a bankrupt, the trust, so far as it cut down his life estate, would not prevail against his assignees in bankruptcy, except to the extent of his wife's fortune paid to him in consideration of the settlement. This I consider to be settled law.

But Martin Doherty has not been adjudicated a bankrupt; and the question arises whether the trust referred to is void as against any particular creditor or his creditors generally.

In *Detmold* v. *Detmold* (1) there was a marriage settlement of the settlor's own property on trust to pay the income to himself during his life or till he should become bankrupt, or should assign, charge, or incumber the said income, or should do or suffer something whereby the same or some part thereof would through his act, default, or by operation of law, if belonging absolutely to him, become vested in or payable to some other person or persons, and from and after the determination of that trust in the settlor's favour upon trust to pay the income to his wife during her life. Some years after the execution of the settlement and during the joint lives of the husband and wife a creditor recovered judgment against the husband, and obtained an order in the action by way of execution, appointing himself receiver over the income payable to the husband under the settlement. Subsequently a receiving order in bankruptcy was made against the husband; and he was afterwards adjudicated a bankrupt upon an act of bankruptcy committed after the receiver order by way of execution was made

(1) 40 Ch. D. 585.

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in favour of the judgment creditor. The question arose whether the forfeiture of the husband's life estate had taken effect in favour of the wife, or whether the forfeiture clause was void as against the trustee in bankruptcy. North J., in giving judgment, said:—"A settlement by a man of his own property upon himself for life, with a clause forfeiting his interest in the event of alienation, or attempted alienation, has never, so far as I know, been defeated in favour of a particular alienee; it has only been defeated in favour of the settlor's creditors generally, on the ground that it would be a fraud on the bankrupt law. Under the trusts of this settlement the wife is now clearly entitled to the income, if the prior life interest given to the husband has legally come to an end. In my opinion, the appointment of a receiver by the order of the 19th July established that the husband had done or suffered something whereby the income of the trust fund, or some part thereof, 'would through his act, default, or by operation of law, if belonging absolutely to him, become vested in or payable to some other person' . . . It was a decision arrived at in the presence of the husband that, as between him and the judgment creditor, the income belonged to the latter. The trustee in the bankruptcy is also bound by that order, because the bankruptcy did not commence until the 29th of July. Before that date the husband had done an act, had suffered something, by which the right to receive the income had become vested in another person, and, therefore, the gift over in favour of the wife had taken effect. It is said that a gift over of a man's own property in the event of his bankruptcy is void, and no doubt that is so. But it has been held that a gift over in the event of a voluntary assignment by him is valid. This was established by *Brooke* v. *Pearson* (1) and *Knight* v. *Browne* (2), and I think the principle of those decisions applies to an involuntary alienation by operation of law in favour of a particular creditor. The distinction between those cases and a clause of forfeiture in the event of an alienation in favour of creditors generally, resulting from bankruptcy, was pointed out by Vice-Chancellor Bacon in *Ex parte Stephens* (3). In my opinion those authorities show that the limitation of the life

(1) 27 Beav. 181. (2) 9 W. R. 515. (3) 3 Ch. D. 807.

interest to the settlor was validly determined by the fact that, in consequence of the order appointing the receiver, he ceased to be entitled to receive the income. This took place before the commencement of the bankruptcy, and, therefore, the forfeiture is valid as against the trustee in the bankruptcy."

Here we have a decision to the effect that in the case of a forfeiture clause in either of two events—bankruptcy or alienation, voluntary or involuntary—while the forfeiture in the event of bankruptcy would not be effective because invalid, the forfeiture in the event of alienation, if it preceded the bankruptcy, would take effect in favour of the wife.

The result is certainly a curious one, because the activity of one creditor would deprive both himself and all other creditors of the means of getting paid anything, and is so startling as to throw a doubt upon the decision.

I have not, however, to deal with a case in which there has been an alienation causing forfeiture. The forfeiture, if it occurred in the present case, was caused by insolvency, and it is to be noticed that, while in *Detmold* v. *Detmold* (1) the life estate was determinable by bankruptcy or alienation, here it was made determinable on bankruptcy, insolvency, or alienation, and nothing has happened except insolvency. There has been no bankruptcy, and there are no assignees to dispute the forfeiture. Is it competent for any individual creditor or creditors to dispute it?

I think that this question is settled, at least so far as this country is concerned, by the decision of Brady L.C. in *Casey's Trusts* (2). There the limitation of the settlor's property was to himself for life, or until he should become bankrupt or insolvent. The settlor had not been adjudicated a bankrupt, but he was insolvent, and the Master of the Rolls (3), affirming the report of Master Brooke, decided that trustees for creditors of the settlor under a trust deed could not dispute the forfeiture on insolvency, as the settlor had not become bankrupt. This decision, having come on appeal before the L.C., was reversed on the ground that there was no distinction between a forfeiture on bankruptcy and

(1) 40 Ch. D. 585. (2) 4 Ir. Ch. R. 247. (3) 3 Ir. Ch. R. 419.

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a forfeiture on insolvency. After referring to *Phipps* v. *Ennismore* (1), in which Lord Lyndhurst had decided that a settlement of the settlor's own property, which he held for life, upon a discretionary trust for himself, his wife, and children, in the event of his alienating or incumbering it, was invalid, Brady L.C. said:—"Lord Lyndhurst points merely to specific incumbrances, but surely his reasoning applies with even more force to the case of creditors and of a deed like this, which provides that the tenant for life shall continue to enjoy the apparent ownership of the estate, and yet enables the trustees for his family to say that if he be insolvent, if he fall into utterly embarrassed circumstances, it shall cease to be his, and that, because he has been practising a fraud on the entire world by holding himself out as the owner of a property which is not his, he shall defeat his *bona fide* creditors. If laying the foundation for a possible fraud will in itself make a transaction fraudulent, this case comes more within that principle than *Phipps* v. *Lord Ennismore*" (1). Later on he says:—"I cannot take any distinction between general creditors and general assignees, and I think that if the limitations be void they are void altogether" (2).

I am not aware that this judgment of Brady L.C. has been overruled or dissented from by any subsequent judgment in this country, and I am bound to follow it.

I must, therefore, hold that the trust contained in the settlement of Martin Doherty's property to raise £1000 for his wife in the event of his insolvency is only valid to the extent of £500, the amount of her fortune paid to him.

I must also hold that the claim of the wife to the extent of £500 takes priority, so far as the settled property is concerned, over the general creditors of Martin Doherty.

It is right to say, in case of any misapprehension, that this decision does not affect the right of Teresa Doherty on the death of Martin Doherty to raise the balance of the £1000.

I think that Teresa Doherty should have her costs with her demand, that the trustee Maurice Power should have his costs out of the estate, to be taxed as trustee's costs, and to be paid in

(1) 4 Russ. 131. (2) 4 Ir. Ch. R. 247, at p. 254.

priority to all other claims, and that the Bank of Ireland should have its costs out of the estate, subject to the costs aforesaid.

The Bank of Ireland was nominated to represent the general body of creditors.

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Solicitors for the plaintiff: *Colfer & Son.*

Solicitor for the Bank of Ireland: *C. J. Rutherford.*

W. L.

RATH *v.* M'MULLAN.

Barton J. 1915.

March 31. April 23.

Equitable Mortgage—Solicitor's lien—Principal and Agent—Liability of Principal.

Appeal. 1915.

June 29.

As against third parties, a solicitor's lien on documents gives no higher right to the solicitor than his client himself possesses.

L'A. having been entrusted by N. as her agent to invest her moneys, invested part of them in the lands of E., taking a conveyance in his own name. He lodged the title-deeds with his solicitor M'M., to whom he was indebted in a large sum for costs in other matters unconnected with N. L'A. was declared a trustee for N. of the lands of E. by a decree of a Judge of the Chancery Division. M'M., who had no notice of L'A.'s agency, claimed a lien on the deeds for all costs incurred by L'A.

Held, by the Court of Appeal, affirming Barton J., that the lien did not affect N.'s interest in the lands save as regards L'A.'s costs necessarily incurred in respect of the lands of which he was a trustee.

SUMMONS in an administration action brought to administer Mrs. Nolan's estate.

The facts of the case and the arguments in Mr. Justice Barton's Court sufficiently appear in the judgment of Barton J.

Dickie K.C. and *James Henry* for William A. M'Mullan.

J. H. Pigot K.C. for a legatee of Mrs. Nolan.

Cur. adv. vult.

April 23.

BARTON J.:—

This is a legatee's suit for the administration of the estate of the late Mrs. Jane Nolan. The present summons is brought on behalf of the defendants, the executors, one of whom is Mr. Wm. A. M'Mullan, a solicitor. A considerable balance has been found against the executors, who claim, as against this balance, to set off

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the benefit of a solicitor's lien. Part of Mrs. Nolan's estate consists of the lands of Elm Park, Merrion, Co. Dublin. Mrs. Nolan established her right to that property in a Chancery suit against one Frederick G. L'Amie, who had been her agent for the investment of her moneys. Mr. William A. M'Mullan held the title-deeds of Elm Park as solicitor for Frederick G. L'Amie, who owed him moneys on foot of several bills of costs, amounting in all to upwards of £350. The question to be decided upon this summons is, whether that lien affects the interest of the late Mrs. Nolan in the Elm Park property.

The facts are peculiar. In the year 1906, a solicitor named Harold Geoghegan absconded from Dublin, leaving behind him a trail of fraud and loss, which for several years led to litigation both in the Chancery and Common Law Courts, and gave rise to at least one criminal prosecution. Among the persons involved in transactions with Geoghegan, as a financial agent, was this L'Amie. I have seen no evidence against him of complicity in any of Geoghegan's frauds. The question of his complicity has never been put in issue before me. But it is clear that he was mixed up with Harold Geoghegan in several transactions. L'Amie employed Mr. Wm. A. M'Mullan as his solicitor, and incurred liability to him for eleven different bills of costs. The majority of these bills of costs arose out of bills or promissory notes endorsed by Harold Geoghegan to L'Amie. One was in respect of the defence of one of Harold Geoghegan's clerks upon a criminal charge of forgery and perjury. Another was in respect of the purchase of these leasehold lands of Elm Park, which L'Amie bought for £300 in his own name, with a view to obtaining a renewal lease, and to selling it at a profit. Mr. M'Mullan's brother, Mr. Louis M'Mullan, who had been in negotiation for the purchase of the property, was to share with L'Amie the profits of the deal. L'Amie handed the title-deeds of Elm Park to Mr. Wm. M'Mullan, who, as against L'Amie, had a general lien for all costs due to him by L'Amie.

In April, 1907, L'Amie, having failed to extricate himself from heavy financial difficulties, suddenly left the country. It then appeared that he had been acting as agent for Mrs. Jane Nolan, who had entrusted to him upwards of £6000 for investment,

and that in respect of this sum he was in default to an amount which was afterwards ascertained at upwards of £2500. Before going away he wrote a letter to Mrs. Nolan, in which he stated that Mr. Wm. M'Mullan had the papers in connexion with certain mortgages, "and also the papers about Elm Park, which I purchased with your money." Mrs. Nolan then instituted an action against L'Amie, claiming inter alia to have L'Amie declared a trustee for her of the lands of Elm Park. In that action it was found by the Chief Clerk's certificate, and declared by the Court by the order on further consideration, dated the 25th March, 1908, that, "as between the plaintiff and defendant, the plaintiff is entitled to the lands of Elm Park"; and the defendant was ordered within one week to execute a conveyance of the lands to the plaintiff. The basis of that declaration, as appears from the statement of claim, was that the plaintiff had entrusted moneys to the defendant for investment which he had invested in the purchase of Elm Park, that the title-deeds had been made out in his name, and that he was a trustee of the lands for the plaintiff.

Upon these facts Mr. Dickie has argued on behalf of the defendants that the lien which Mr. M'Mullan had upon the title-deeds of Elm Park for all costs due to him by L'Amie bound Mrs. Nolan's interest in the land. He relied upon *Perry Herrick* v. *Attwood* (1); *Brocklesby* v. *Temperance Building Society* (2); *Rimmer* v. *Webster* (3); *Lloyd's Bank, Ltd.* v. *Cooke* (4); *Fry* v. *Smellie* (5). These were cases of mortgages or purchases from an agent, whom the owner had clothed with the authority and indicia of absolute ownership for the purpose of enabling the agent to deal with property in a limited way. He also referred to *George* v. *Claggett* (6), and to the rule of set-off as against an undisclosed principal who, by entrusting an agent with goods, holds him out as principal to third parties. It is enough to say that the present is not one of either of those classes of case. It is not a case of a mortgage or sale to Mr. M'Mullan by an agent entrusted with the authority and indicia of title; nor is it a case of a sale of goods to Mr. M'Mullan by an agent entrusted with

(1) 2 De G. & J. 21.
(2) [1895] A. C. 173.
(3) [1902] 2 Ch. 163.
(4) [1907] 1 K. B. 794.
(5) [1912] 3 K. B. 282.
(6) 7 T. R. 359.

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them and held out as principal, nor is it analogous to either of those kinds of transaction.

This is a case of a solicitor's lien, as to which the rule is that, as against third parties, a lien gives no higher right to a solicitor than the client himself possesses: *Molesworth* v. *Robbins* (1); see also *Bell* v. *Taylor* (2). A case in point is *Smith* v. *Chichester* (3), where in 1835 a lessee, being the legal and apparent owner of the leasehold, left the lease with solicitors who obtained a lien thereon for the costs due by the lessee. In 1838 the lease was declared a graft on a former lease of which it was a renewal. The former lease had been mortgaged, and it was held that the solicitor's lien did not affect the mortgagee's interest. In the present case Mr. M'Mullan's client L'Amie had no interest, as appears by the Master of the Rolls' decree, except as trustee with his right of indemnity for costs, charges, and expenses. To that extent, namely, for costs properly incurred in reference to the Elm Park property itself (which appear to have been drawn at £74 13*s.* 8*d.*), Mr. M'Mullan's lien extends.

I am of opinion that, save as regards any costs necessarily and properly incurred in respect of this property of Elm Park itself, Mr. M'Mullan has no lien that can affect the interest of Mrs. Nolan.

The question is one of law, and I treat it as such. So far as the merits are concerned, I must add that I think the result is a right one. If one of these two persons who confided in L'Amie is to suffer by L'Amie's act, I think it should be the experienced solicitor whose client L'Amie was in eleven other peculiar transactions, and not the inexperienced lady who had trusted L'Amie as her agent with money for investment. The many extraordinary transactions in which L'Amie was, to his solicitor's knowledge, mixed up might well have put Mr. M'Mullan on his guard in relation to this land speculation about the Elm Park property, in which L'Amie and Mr. M'Mullan's brother were embarked. I have treated Mr. M'Mullan as having been blameless in this matter, but there was certainly much to make a prudent man cautious, when taking deeds from L'Amie under the circumstances. But,

(1) 2 Jo. & Lat. 358, at p. 371, *per* Sugden C.

(2) 8 Sim. 216.

(3) 2 Dr. & War. 393.

while I think that on the facts the result is a right one, I rest my decision upon the settled principles which govern and limit the extent and the operation of a solicitor's lien.

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The applicant appealed (1).

June 29.

Dickie K.C. and *James Henry*, for the appellant.
Pigot K.C. and *H. Macdermot*, for the respondent.

The Court of Appeal affirmed the order of Barton J., and dismissed the appeal with costs.

Solicitor for the applicant: *James Dickie.*
Solicitor for the plaintiff in the action: *M. Cartan O'Meara.*

RYAN *v.* BURKE.

(1914. No. 932.)

Barton J.
1915.
June 23, 24.
Appeal.
Nov. 18, 19.
Dec. 21.

Evicted Tenants (Ireland) Act, 1907 (7 *Edw.* 7, *c.* 56)—*Person nominated by Estates Commissioners as personal representative of deceased Evicted Tenant—Trustee—Power of Sale—Conveyance by Beneficiary—Personal Representative, "as beneficial Owner."*

A person nominated as personal representative of a deceased evicted tenant under sect. 2 of the Irish Land Act, 1903, and sect. 17 of the Irish Land Act, 1909, has all the powers of a personal representative, including a power of sale for the purpose of distributing the proceeds among the next-of-kin of the deceased evicted tenant.

One of the next-of-kin of a deceased evicted tenant who had been nominated by the Land Commission as personal representative of a deceased evicted tenant conveyed "as beneficial owner" the holding of the deceased evicted tenant to a purchaser.

Held, by the Court of Appeal, affirming Barton J., that all the interest of the personal representative as such passed to the purchaser.

TRIAL OF ACTION.

Thomas Ryan, an evicted tenant, died on the 3rd of April, 1893, intestate, leaving him surviving eleven children, of whom the eldest was James Ryan.

(1) IN the Court of Appeal, before CHERRY L.C.J., PALLES C.B., and MOLONY L.J.

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By an agreement dated the 26th February, 1910, James Ryan, as representative of Thomas Ryan, deceased, agreed to purchase from the Irish Land Commission, under the provisions of the Irish Land Acts, 1903 and 1907, the lands of Ballyheehan, County Tipperary, and for the purpose of purchase applied to the Land Commission for an advance of £880, to be repaid by an annuity of £28 12*s*. On the 14th March, 1910, the Estates Commissioners sanctioned the advance of £880.

On the 8th December, 1911, the Estates Commissioners made the following order:—"Whereas Thomas Ryan, deceased, was within twenty-five years before the passing of the Irish Land Act, 1903, a tenant of the lands of Knockaderry, and whereas the tenancy of the said Thomas Ryan has been determined, we hereby nominate James Ryan as the personal representative of the said Thomas Ryan for the purposes of section 2 of the said Act."

On the 1st May, 1912, the lands of Ballyheehan were vested by fiat by the Estates Commissioners under the provisions of the Evicted Tenants Act, 1907, and the Irish Land Purchase Acts in James Ryan.

On the 18th April, 1912, James Ryan executed a deed of assignment, which was registered in the Land Registry of Ireland, whereby, in consideration of the payment of £750, James Ryan purported "as beneficial owner" to assign the said lands so vested in him to the defendant. At the time of such assignment, and previously, the defendant had notice that the title of James Ryan to the lands (save as to his distinctive share as one of the next-of-kin of his father) was only as a person nominated by the Land Commission as personal representative of a deceased evicted tenant.

The assignment to the defendant was made with the consent of the Land Commission.

On the 31st May, 1913, administration of the real and personal estate of Thomas Ryan was granted to the plaintiff forth of the principal registry of the King's Bench Division (Probate) of the High Court of Justice in Ireland.

The plaintiff, Michael Ryan, the youngest son of Thomas Ryan, suing as administrator of Thomas Ryan, claimed a declaration that the defendant was a trustee of the lands of Ballyheehan

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for the next-of-kin of Thomas Ryan, and an order upon the defendant to convey the lands to the plaintiff.

The defendant by his defence said that the assignment to him had been made with the express consent of the Irish Land Commission, and that his title as owner in fee-simple was duly registered under the Local Registration of Title Act, 1891; and the defendant claimed to be absolutely and beneficially entitled to the lands.

P. D. Fleming K.C. (with him *P. Lynch K.C.* and *A. Clery*), for the plaintiff:—

Where the Estates Commissioners, under the provisions of the Irish Land Acts, vest a holding in a person nominated by them as personal representative of a tenant of a holding formerly occupied by an evicted tenant, such person is a trustee of the holding for the next-of-kin of the evicted tenant: *M'Carron* v. *M'Carron* (1); following *Coyle* v. *Coyle* (2); *Cronin* v. *Cronin* (3). Such a personal representative is a limited administrator for the purposes of the Acts, and has not the same powers as a legally constituted personal representative: *Canny* v. *Harvey* (4).

Serjeant Matheson K.C. (with him *Carrigan K.C.* and *Lupton*), for the defendant:—

Assuming that the statutory administrator went in as administrator for a limited purpose, that purpose was to distribute amongst the next-of-kin. Section 11 of the Evicted Tenants Act, 1907, provides that the holding shall not be sold without the consent of the Land Commission. It follows that it can be sold with their consent, which was obtained in this case. An administrator's duty is to sell for the purpose of distribution among the next-of-kin when such distribution cannot be otherwise effected: *Bradley* v. *Flood* (5).

P. Lynch K.C., in reply:—

An administrator has no right of sale save to pay debts: *In re Molyneux and White* (6); *Attenborough* v. *Solomon* (7). Section 11

(1) 47 I. L. T. R. 174.
(2) [1911] 1 I. R. 120.
(3) Not reported. C. A., June 26, 29, 1914.
(4) 11 I. L. T. R. 178.
(5) 16 Ir. Ch. R. 236.
(6) 15 L. R. Ir. 383.
(7) [1913] A. C. 76.

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of the Evicted Tenants Act, 1907, provides that the holding shall not be available for the purpose of paying any of the debts of the evicted tenant.

In the conveyance to the defendant the vendor, James Ryan, is expressed to convey "as beneficial owner." Therefore, the defendant by his conveyance acquired only the beneficial interest of James Ryan in the lands as one of the next-of-kin of the evicted tenant.

[BARTON J. referred to *In re Venn and Furze's Contract* (1); *In re Henson* (2); *In re Roulston's Trusts* (3).]

Serjeant Matheson K.C.:—

As to the conveyancing point, section 63 of the Conveyancing Act, 1881, provides that when a grantor conveys "as beneficial owner" the conveyance is effectual to carry all the interest of the grantor.

BARTON J.:—

The defendant purchased these lands, at a properly conducted auction and at a fair price, from the personal representative of a deceased evicted tenant, who had been nominated as such by the Irish Land Commission under sect. 2 (*d*) of the Irish Land Act, 1903, and sect. 17 (*c*) of the Irish Land Act, 1909. The vendor represented himself as selling for the purpose of distribution among the next-of-kin of the deceased evicted tenant. The defendant was an honest purchaser; but it appears that the vendor, instead of distributing the proceeds among the next-of-kin of the evicted tenant, as it was his duty to do, wrongfully converted them to his own use. In these circumstances one of the next-of-kin of the deceased evicted tenant, instead of requiring the vendor to render an account of the purchase-money, brings this action to impeach the sale, and seeks to have it declared that the purchaser holds the property in trust for the plaintiff and for the other next-of-kin of the deceased evicted tenant. I am of opinion that the plaintiff's claim is unsustainable, and that the ingenious grounds upon which it was supported have no foundation in law.

(1) [1894] 2 Ch. 101, 114.
(2) [1908] 2 Ch. 356.
(3) 21 L. R. Ir. 503.

It was contended that, as this legislation was aimed at the restoration of evicted tenants, it did not contemplate the sale of lands acquired for them. That argument, if logically developed, means that lands sold to an evicted tenant, or to his representative, under the Land Purchase and Evicted Tenants Acts are inalienable. But it is clear from sect. 11, sub-s. 1, of the Evicted Tenants Act of 1907 that, although such lands cannot be sold without the consent of the Land Commission, they may be sold with that consent, which was given in this case.

It was next contended that the statutory personal representative of a deceased evicted tenant has no power of sale; and *Canny* v. *Harvey* (1) was relied upon. That case was decided under sect. 59 of the Land Act of 1870, which contemplated the appointment of an "administrator limited to the purposes of this Act," and refers to him elsewhere as "such limited administrator." The sections governing the present case are quite different. They are sects. 2 (*d*) of the Land Purchase Act of 1903, and sect. 17 (*c*) of the Land Purchase Act of 1909. They provide for the nomination of a personal representative of a deceased evicted tenant. The lands cannot be made available for the debts of the deceased evicted tenant. But, in other respects, the sections contemplate the nomination of a personal representative with the ordinary powers of a personal representative for the purpose of administration, which include a power of sale for the purpose of distribution. In a case like the present, where there are a number of children of the deceased evicted tenant scattered all over the world, the estate could not be administered without distribution, and could not be distributed without sale. That an administrator has a power and a duty to sell for the purpose of distribution among next-of-kin is well settled: *In re O'Donnell's Estate* (2).

There remains a conveyancing point. In the deed of assignment, dated the 18th April, 1912, the lands are expressed to be conveyed by the vendor as "beneficial owner." It was contended that the vendor was only parting with his own beneficial interest, and was not selling as trustee. The same point was raised and disposed of in *In re Roulston's Trusts* (3), and in *In re Henson* (4).

(1) 11 I. L. T. R. 178.
(2) [1905] 1 I. R. 406.
(3) 21 L. R. Ir. 503.
(4) [1908] 2 Ch. 356.

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A personal representative selling the estate, which he holds as such, is presumed to be selling in his representative character, and this presumption is not rebutted by the mistake of a conveyancing clerk in inserting the words as "beneficial owner." In the present case the vendor sold as personal representative, and there is nothing to prevent the passing to the defendant of all the interest which he had in that character.

As I see no ground for declaring the defendant to be a trustee for the plaintiff, this action must be dismissed with costs.

Solicitors for the plaintiff: *Corrigan & Corrigan.*
Solicitor for the defendant: *William Dwyer.*

D. M. S.

Nov. 18, 19. Dec. 21.

The plaintiff appealed (1).

In addition to the cases relied on before Barton J., *Tevlin* v. *Gilsenan* (2) and *In re Thompson and M'Williams' Contract* (3) were cited.

The Court of Appeal affirmed the order of Barton J., and dismissed the appeal with costs.

(1) In the Court of Appeal, before O'CONNOR M.R., RONAN and MOLONY L.JJ.

(2) [1902] 1 I. R. 514. (3) [1896] 1 I. R. 356.

LEONARD *v.* DOWLING.

Barton J.
1916.
April 12.
June 9.

Administration—Administration of Freehold Registered Land sold under the Land Purchase Acts—Effect of Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66)—Order of Assets—Will—Construction—Mixed Fund of Real and Personal Estate.

A testatrix by her will directed her executor to pay all her debts, and devised and bequeathed to him all her property of every nature and kind which she should be possessed of at the time of her death, making him universal legatee and devisee, and directing him to convert all her said property and apply same for Masses. Testatrix's assets included a farm of land purchased under the Land Purchase Acts, and duly registered in testatrix's name under the provisions of the Local Registration (Ireland) Act, 1891. Testatrix died within three months after the execution of the will, and the charitable gift failed as regards testatrix's land. Questions arose as to the order in which testatrix's realty and personalty should be applied towards the payment of debts.

Held, (1) that having regard to the proviso contained in sub-s. 3 of sect. 86 of the Local Registration of Title (Ireland) Act, 1891, the testatrix's registered lands should be treated as real estate for the purpose of ascertaining the order in which the real and personal assets of the testatrix were respectively applicable towards the payment of debts; but (2) that the testatrix had created a mixed fund for the payment of debts, consisting of all the realty and personalty of which she was possessed at her death, and that the debts were payable out of the realty and the personalty *pro rata*.

Luckcraft v. *Pridham*, 48 L. J. Ch., distinguished.

Allan v. *Gott*, L. R. 7 Ch. 439, applied.

COUNTY COURT APPEAL.

Margaret Eiffe, spinster, of Ardcath, county Meath, made her last will dated 22nd January, 1915, as follows:—"I appoint the Rev. John Leonard, of Ardcath, sole executor of this my will, and I direct him as soon as possible after my death to pay all my just debts, funeral and testamentary expenses. I give, devise, and bequeath all my property of every nature and kind which I shall be possessed of at the time of my death unto the said Rev. John Leonard, and I direct him to convert so much thereof as does not all consist of money into same. I direct that the said Rev. John Leonard is to apply all my said property of every nature and

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kind when converted into money for the purpose of saying Masses for the repose of the souls of myself, my parents, sisters, and brothers, the honorarium for each Mass to be 5*s.*, all said Masses to be said in public and in Ireland only." Testatrix died on the 24th January, 1915, two days after the making of the will.

The assets of the testatrix consisted of cash in house £25; chattels which realized £100; a farm of land purchased under the Irish Land Purchase Acts, and duly registered in her name under the provisions of the Local Registration of Title (Ireland) Act, 1891, which was sold by the executor by public auction for £400.

In equity proceedings it was contended on behalf of the plaintiff, the Rev. John Leonard, that as the bequest of the farm was void having regard to the provisions of the 7th & 8th Vict. c. 97, s. 16, the proceeds of the farm being the undisposed residue were liable to pay all the debts, funeral and testamentary expenses to the entire relief of the other portions of testatrix's property. The County Court Judge decided in favour of the contention of the next-of-kin that the debts, &c., should fall entirely on the pure personalty. The plaintiff appealed.

T. S. M'Cann K.C. and *John O'Byrne*, for the plaintiff, the appellant.

Sainsbury, for the defendant, one of the next-of-kin.

E. S. Murphy, for Richard Dowling, another of the next-of-kin.

The arguments sufficiently appear in the judgment of Barton J.

Cur. adv. vult.

BARTON J.:—

The testatrix, Margaret Eiffe, appointed the plaintiff, the Rev. J. Leonard, sole executor of her will, and directed him as soon as possible after her death to pay all debts, funeral and testamentary expenses, and devised and bequeathed to him "all my property of every nature and kind which I shall be possessed of at the time of my death"; and directed him to convert all said property which did not consist of money, and when converted to apply the money for Masses. Part of the property consisted of freehold registered land. Testatrix died two days after the date of the will. Accordingly, the charitable gift failed so far

as the land is concerned, with the result that certain questions arise with reference to the basis upon which the assets are to be applied for the purpose of payment of debts.

The first point is whether this freehold registered land is to be treated for this purpose as real estate. I am of opinion that it must be so treated. The effect of the Registration of Title Act, 1891 (1), is that freehold registered land is real estate, and is subject to the ordinary rules of law as to the disposition of real estate: *Longworth* v. *Campbell* (2). It is true that under sect. 84 it vests in the personal representative of the registered owner as if it were a chattel real; that under sect. 85 (in the case of intestacy) the beneficial interest in it devolves as if it were personalty; and that under sect. 86 it is to be administered as personal estate. But there is a proviso at the end of sect. 86, sub-sect. 3, which runs as follows:—"Provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies." That means, in my opinion, that while freehold registered land is to be administered as personal estate, it is to be applied for the payment of debts in its proper order as real estate. That view is supported by *In re Kempster* (3); but I arrive at it independently of that case, and I hold that, for the purpose of the decision of the question before the Court, this freehold registered land must be treated as real estate.

The second question is whether the debts are to be paid out of the primary fund, namely, the personalty, or whether the realty

(1) Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), sect. 86, sub-s. 3. "In the administration of the assets of a person dying after the commencement of this Act, seised of or entitled to any land to which this part of this Act applies, such land shall be administered in the same manner, subject to the same liabilities for debts, costs, and expenses, and with the same incidents as if it were personal estate: provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies."

By sect. 83, the part of the Act above referred to (Part IV) applies to "freehold registered land which shall have been at any time sold and conveyed to or vested in a purchaser under any of the provisions of the Purchase of Land (Ireland) Acts."

(2) [1910] 1 I. R. 23. (3) [1906] 1 Ch. 446.

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and personalty are constituted by the will a mixed fund, for the purpose of the payment of debts, so as to render the debts payable, *pro rata*, out of both realty and personalty. In order to constitute a mixed fund, it is necessary to find in the will a direction for the conversion and sale of the real estate, "so as to throw the two funds absolutely and inevitably together, to answer the common purposes of the will": *per* Turner L.J., in *Tench* v. *Cheese* (1). Mr. Murphy, on behalf of the next-of-kin, relied upon *Luckcraft* v. *Pridham* (2), where there was a direction to convert; but, as Hall V.-C. said at p. 638, there was "nothing in terms to show that, having converted the real estate into money, and got that in hand, you are to pay the charge of debts out of the common fund composed of both." The question is whether an intention is shown in the will to throw realty and personalty together in the way pointed out by Turner L.J.

The simplest way of showing such an intention is by an express direction to sell for that purpose, as in *Roberts* v. *Walker* (3). But the Court may find the intention without any express direction, as in *Simmons* v. *Rose* (4), where there were directions that the proceeds of the real estate should be considered as part of the personal estate, and in *Allan* v. *Gott* (5), where the whole fund was put in the hands of trustees, with a full discretion, which enabled them to sell and apply the realty, if they liked, before touching any of the personalty.

In the present will the testatrix in the first place directs the executor to pay all debts, funeral and testamentary expenses, as soon as possible after her death. That creates a general charge upon realty and personalty, but it does not displace the primary liability of the personalty. Then she bequeaths all her property of every nature and kind to the plaintiff, making him universal devisee and legatee, and directing him to convert it into money. That is a direction to create a mixed fund; but, if it stood alone, it might be consistent with an intention that the debts were to be first paid, and that the residue after paying debts was to constitute the mixed fund. But the testatrix tells us of what the

(1) 6 D. M. & G. 453, at p. 467.
(2) 48 L. J. Ch. 636.
(3) 1 R. & M. 752.
(4) 6 D. G. M. G. 411.
(5) 41 L. J. Ch. 571.

mixed fund was to consist. She directs a mixed fund of money to be created out of "*all my property of every kind which I shall be possessed of at the time of my death.*" In other words, the whole property, as it stood at the time of death, is given to the plaintiff in its entirety, with a direction to convert into money. Accordingly, although the direction to pay debts occurs at the beginning of the will, there is nothing to prevent the executor from discharging them out of the realty, because the mixed fund, which is devised and bequeathed to him *in globo*, is to consist of all the property which the testatrix had at the time of her death. This element seems to me to distinguish this case from *Luckcraft* v. *Pridham* (1), where the mixed fund was given, *subject to* the previous direction to pay debts. In the present case the mixed money fund is not given subject to the payment of debts, but is blended in one gift from the death, and given to the executor in that form for the purposes of the will, so that, as in *Allan* v. *Gott* (2), nobody would have any right to control the direction of the executor, if he should think fit to sell realty for payment of debts, before resorting to personalty. It is, in effect, a gift of realty and personalty with a direction to sell and pay debts out of the proceeds. This view seems to me to be consistent with what Eve J. said in reference to a "mixed fund" in *In re Smith* (3) at p. 223.

In these circumstances I think the debts should be thrown upon the realty and personalty, *pro rata*.

Solicitor for the plaintiff: *J. J. Lynch.*

Solicitor for the defendant: *Thomas Tiernan.*

Solicitors for Richard Dowling: *John Clark & Co.*

D. M. S.

(1) 48 L. J. Ch. 636.
(2) 41 L. J. Ch. 571.
(3) [1913] 2 Ch. 216.

Ross J.
1916.

June 30.
July 5, 7.

B., Deceased.
O. *v.* D.

Will—Construction—"Children"—Illegitimate Child.

A., a hospital nurse, attended B. during his illness. They lived together, and in 1892 a child (E.) was born to them, but they were not married till 1894; but E. was always treated as B.'s legitimate daughter.

On June 25, 1896 (there being no prospect of any further issue), B. made a will leaving all his real and personal estate to his brother on trust, after payment of his debts, to realize a sum of £4000, to invest same and apply the income for the maintenance and education of his daughter E. during minority or until marriage, and then to pay the capital to her. The testator left the residue of his property upon trust to pay the income to A. for life, and then the capital to his children in equal shares, and if only one child, the whole to such child. E. came of age on Jan. 1, 1913.

Held, that A. and E. were jointly entitled to be paid the funds, and to have the securities transferred to them, subject to the trusts of the will, on the ground that the word "children" included E., whom the testator described as his daughter.

Dorin v. *Dorin* (L. R. 7 H. L. 568) distinguished.

Originating Summons.

The deceased by his will left his freehold and personal property upon trust, after payment of his debts, to realize the sum of £4,000 to be invested in trustee securities, and to apply the income for the maintenance and education of E. (described in the will as "my daughter E.") during minority or marriage, and to pay the capital of the said sum of £4,000 to his "said daughter E." on her attaining twenty-one years or marrying, whichever should first happen. The testator left the entire residue of his property upon trust to leave it in the business of D. & Son at the discretion of the trustee, or to take out the testator's share of the capital of the business, and invest same in trustee securities, and to pay the income to the testator's wife for life, and on her death the capital was to go to his children in equal shares, or, if there should be only one child, the whole to such child.

The summons was brought under Order LV, rule 4, by X. and Y., trustees of the will of the deceased, against A., widow of

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the deceased, E., his daughter (legatees), J., his heir-at-law and one of the next-of-kin, and M., another of the next-of-kin, to have it determined whether, under the residuary clause in the will, the defendants A. and E. were jointly entitled to be paid the funds and to have the securities transferred to them subject to the trusts of the will.

The facts, as to which there was no dispute, were as follows:—

One of the defendants, who was the wife of the testator, was trained as a hospital nurse. In that capacity she attended the testator, and nursed him through several serious attacks of illness. They became very much attached to each other, and the testator made her proposals of marriage, which she declined on the ground that the difference in their social position might be a hindrance to the testator. She continued to live with him for a considerable time. When the birth of their child was approaching, he renewed his proposal, which she again declined. Their daughter E. was born on 1st January, 1892, but they were not married till 4th September, 1894. The deceased took a house in the year 1893, in which he lived with his wife and daughter until his death in August, 1896. In that interval various members of his family stopped as visitors in the house, and the testator's wife was on terms of friendship with them, as well as with all the testator's intimate friends. The child was always introduced as his daughter, and was in every way treated as a lawful child. Prior to the making of his will on 22nd June, 1896, the testator's doctor advised him that there was a serious possibility of gout, from which he was suffering, attacking his stomach, with fatal results. Thereupon he made his will. He informed his wife that he had done so. The doctor's warning was realized. The gout attacked his stomach, and, on the 7th of August, 1896, he died. His wife swore that neither at the date of his will nor at the date of his death was there any expectation or prospect of any further issue of the marriage. The testator's daughter had been highly educated, and was, at the date of hearing, in her twenty-fourth year. The testator died possessed of large personal estate, and also of real estate.

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Carrigan K.C., for the trustees.

Pigot K.C., for E., *P. A. O'C. White*, for A., and *Leonard*, for the heir-at-law (who was also one of the next-of-kin), supported E.'s claim.

The principle laid down in *Hill* v. *Crook* (1) is that prima facie illegitimate children are not included in the word "children"; but when from the will itself and the surrounding circumstances it can be gathered that a testator intended an illegitimate child to be included in the class of children, such child will take. In the present case no argument to the contrary can be drawn from the appointment of the testator's widow as guardian of his daughter. Even as far as legitimate children are concerned, apart from any testamentary disposition, the widow is now guardian by statute—that is to say, the clause, though inoperative in the case of an illegitimate child: *Sleeman* v. *Wilson* (2), is unnecessary in the case of legitimate children. What the testator meant and the legal effect of his words are two different things. The latest authority for what Lord Cairns calls the "dictionary" is *Gent* v. *Kiddle* (3). In that case the Court held that the testatrix made a "dictionary" for herself, and held that under a residuary gift to "all my grandchildren," the children of testatrix's illegitimate son (whom she described earlier in the will as "my son George") were entitled to share.

Phelps, for other next-of-kin:—

A gift to children prima facie excludes illegitimate children: *Hill* v. *Crook* (1), and this construction will not yield to mere conjecture. There are two exceptions to the rule: First, where it is impossible that any legitimate children could take under the bequest; and, secondly, where there is upon the face of the will, and upon a just and proper construction and interpretation of the words used in it, an expression of the testator's intention to use the word "children" as including illegitimate children. The testator here has already provided for E.; and the subsequent clause indicated an intention to provide for future children: *Dorin* v. *Dorin* (4). Moreover, he appoints his wife "sole guardian

(1) L. R. 6 H. L. 265.
(2) L. R. 13 Eq. 36.
(3) 92 L. T. R. 724.
(4) L. R. 7 H. L. 568.

of his children." This clause provides a "dictionary" whereby to construe the word "children." "Children" must mean legitimate children; for a man cannot legally appoint a guardian of an illegitimate child, and he must be presumed to intend to do only what he is legally entitled to do: *Sleeman* v. *Wilson* (1). The principle in *Hill* v. *Crooks* (2) has not been cut down. Decisions in favour of bastards are all due to—1, the wording of the will itself, or 2, the impossibility of otherwise giving effect to the will, or 3, the fact that they are *personae designatae*: *In re Pearce* (3); *Godfrey* v. *Davis* (4). Again, a prior legatee is excluded from a subsequent gift: *Megson* v. *Hindle* (5); *Brown* v. *Brown* (6); *Bagley* v. *Mollard* (7). The authorities the other way can be distinguished. *In re Eve* (8) is based on impossibility. In *O'Loughlin* v. *Bellew* (9) either the children took as *personae designatae* or the decision is wrong, having regard to *In re Pearce* (3). In *In re Bryon* (10) the bastard was coupled in a codicil with a legitimate daughter, who was described as "another daughter." In *Bedford* v. *Hughes* (11) the intention was as clear as possible. *In re Parker* (12) and *Couturier* v. *Shea* (13) are both "dictionary" cases. *Seale-Hayne* v. *Jodrell* (14) is a case by itself. *In re Corsellis* (15) was a case of impossibility.

[The following cases were also cited:—*In re Haseldine* (16); *In re Hall* (17); *In re Horner* (18); *Walker* v. *Lutyens* (19); *In re Loveland* (20).]

Cur. adv. vult.

(1) L. R. 13 Eq. 36.
(2) L. R. 6 H. L. 265.
(3) [1914] 1 Ch. 254.
(4) 6 Ves. 43.
(5) 15 Ch. D. 198.
(6) 37 W. R. 472.
(7) 1 Russ. & M. 581.
(8) [1909] 1 Ch. 796.
(9) [1906] 1 I. R. 487.
(10) 30 Ch. D. 110.
(11) [1903] 1 Ch. 198.
(12) [1897] 2 Ch. 208.
(13) 96 L. T. 560.
(14) [1891] A. C. 304.
(15) [1906] 2 Ch. 316.
(16) 31 Ch. D. 511.
(17) 35 Ch. D. 551.
(18) 37 Ch. D. 695.
(19) [1897] 2 Ch. 238.
(20) [1906] 1 Ch. 542.

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Ross J.:—

This case comes before me on a summons taken out by the trustees of the testator's will executed on the 22nd of June, 1896. The question is whether the testator's wife and daughter are now jointly entitled to be paid the funds, and to have the securities transferred to them, subject to the trusts of the will. No question arises on the facts.

[His Lordship then stated the facts as set forth above, and continued:—]

The testator's next-of-kin and his heir-at-law are parties to these proceedings. By his will the deceased devised and bequeathed all his freehold and personal property to his brother upon trust, after payment of debts, to realize thereout the sum of £4000, and to invest the same in trustee securities, and to apply the interest thereon for the maintenance and education of his daughter E. during her minority or until her marriage, and to pay over the capital of the £4000 to his daughter E. on her attaining twenty-one years of age or her marriage; and as to all the rest and remainder of his said property, after a trust to leave it in a business in which he was a partner, upon trust to pay the income of the said property to his wife, B., for her life; and on her death to pay the capital of the said residuary property among his children in equal shares, or, if only one child, the whole to such one child. He appointed his wife to be sole guardian of his children, and appointed his brother, D., to be sole executor of his will.

That the testator intended, in fact, the residue of his estate, subject to his wife's life interest, to be devoted to his daughter, E., does not admit of any reasonable doubt; but to arrive at this conclusion we are driven to speculation and conjecture as to the testator's intentions, and that is forbidden. We are only allowed to form an opinion as to the testator's intention by considering the words of the will and the extrinsic circumstances in so far as they throw light upon the meaning of the words he has used, and no further. The reported cases on the question of the exclusion or inclusion of illegitimate children in the case of gifts to children are many in number and wholly irreconcilable.

In the older cases it is pretty plain that there was a kind of

subconscious opinion that illegitimate children ought not to be favoured. There is no law, however, against devises or bequests to existing illegitimate children if they are provided by apt words. I cannot help thinking that in the more recent decisions the tide of judicial opinion is now running against exclusion. This seems to have been the view of Lord Chancellor Walker (see *O'Loughlin* v. *Bellew* (1)) and of Mr. Justice Kekewich (*Parker* v. *Osborne* (2)). The great majority of reported cases are not very helpful, as they are decided on particular words used in connexion with particular extrinsic facts.

The leading principles that can be gathered from them applicable to this case are three :—

1. The word "children" used in a will without explanation means legitimate children.

2. A testator may by the expression used in his will indicate his intention that his illegitimate children are to be treated as children.

3. Evidence of the surrounding circumstances may be given to throw light on the meaning of the testator's words.

I think in this case the testator has given us a clear indication of what he meant by children.

He makes provision for his daughter E. The word "children" includes sons and daughters—the greater includes the less. Therefore, when he gives the residue subject as stated among his children, his reputed daughter must be taken to be one of the children. Following the reasoning of Romer J. in *Walker* v. *Lutyens* (3), I am of opinion that for the purposes of this will the testator has declared that his daughter E. is to be regarded and taken as legitimate. On the other hand, what Lord Cairns, in *Hill* v. *Cook* (4), calls the "dictionary" is attacked. The expression "my daughter" is said to mean my legitimate daughter. Why is this reasoning fallacious? Because the word employed is not pertinent to the bequest of £4000. But it is highly pertinent to the gift of the residue, as it affects the area of the class to be benefited. There are decisions that support that view. But there

(1) [1906] 1 I. R. 487, at p. 491.
(2) [1897] 2 Ch. 208, at p. 213.
(3) [1897] 2 Ch. 238.
(4) L. R. 6 H. L. 265, at p. 285.

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is one point-blank the other way: *Gent* v. *Kiddle* (1), where certain grandchildren, the children of an illegitimate son, were held entitled to share on the ground that the testatrix described her illegitimate son as "my son George." That is to say, she recognized George as a legitimate son for all the purposes of the will. We now turn to the extrinsic evidence. The testator treats E. as his legitimate daughter. He calls her by his name. He introduces her as his daughter to his intimate friends. He makes a special provision for her to take effect on her attaining twenty-one, or on her marriage. He treated her in every way as his legitimate child. The difficulty in the present case has arisen through the testator's anxiety to conceal the fact that his daughter was born before his marriage. I give no weight whatever to the arguments on either side founded on his appointment of her mother as guardian. The two cases I have mentioned, following the leading case of *Hill* v. *Crook* (2), are, in my opinion, sound, and have not been directly questioned, so far as I know. They appear in the standard authorities such as Jarman, Godefroi, and Theobald. I do not propose to examine the numerous cases on the subject. Some of them do not agree with the case upon which I base this decision. Cases on the construction of wills are not edifying, except where they lay down a principle. The only doubt I have had in this case is suggested by the House of Lords' decision in *Dorin* v. *Dorin* (3). There are very marked distinctions between that case and the present. In the former the will was made on the day following the testator's marriage, and its chief object might well be conceived to be to provide for the issue of the marriage. In the case before me the will was most probably made in contemplation of imminent death. The distinction that weighs most with me is that in the will before me there is an emphatic recognition of E. as the testator's daughter. There is nothing resembling this recognition in *Dorin* v. *Dorin* (3). I have only now to express my high appreciation of the conduct of the heir-at-law in instructing his counsel against his interest to contend for what he believes to have been the true intention of his brother.

(1) 92 L. T. R. 724. (2) L. R. 6 H. L. 265.
(3) L. R. 7 H. L. 568.

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The question will be answered in the affirmative, and the costs of all parties must come out of the assets.

Solicitor for the trustees: *Thomas O'Meara.*
Solicitor for A. (widow) and E. (daughter): *Joseph Tierney.*
Solicitors for the heir-at-law: *D. & T. FitzGerald.*
Solicitor for the other next-of-kin: *Maunsell, Darley, & Orpen.*

T. C. T.

IN THE MATTER OF THE ESTATE OF MARGARET BURKE.

Wylie J.
1916.
July 17, 27.

Bankruptcy—Owner of Grantee's Interest in lands held under Fee Farm Grant a Bankrupt—Official and Creditors' Assignee—Election to take—Reasonable Time—Irish Bankrupt and Insolvent Act, 1857 (*20 & 21 Vict. c.* 60), *ss.* 268 *&* 271.

A testatrix, who was owner of the grantee's interest in lands held under a fee-farm grant, devised the said lands to certain persons for life, and on the death of the survivor to Q. absolutely. The testatrix died in 1861. The last life died in 1904. Q. had been adjudicated a bankrupt in 1878, and a certificate that all his estate and effects, real and personal, had vested in the official and creditors' assignees, pursuant to the statute, was issued in the following year, and was duly registered. The said reversionary interest of Q. was mentioned in his statement of affairs. In 1880 he obtained his certificate of conformity, and died in 1892. By his will he devised all the residue of his real and personal estate, which included the said lands, to his daughters in equal shares. When the reversionary interest fell in in 1904, the daughters entered into possession of the said lands, and in 1906 conveyed the same to B. for valuable consideration. B. thereupon entered into possession of the said lands, and subsequently sold the same under the Land Purchase Acts. On the distribution of the purchase-money in 1916, the official assignee claimed the residue.

Held, that the claim had not been made within a reasonable time, and that the residue of the purchase-money was properly payable to B.

Mackley v. *Pattenden* (1 Best & Smith 181) considered.

QUESTION arising on the ruling of the final schedule of incumbrances, as to who was entitled to the residue of the purchase-money of part of the lands of Ballycullane Beg, which had been sold in this matter under the Land Purchase Acts.

Wylie J. 1916. *In re* BURKE'S ESTATE.

The facts, as stated in the judgment of Wylie J., were as follows:—

The portion of the said lands which had been sold was held under a fee-farm grant, dated the 7th February, 1856, in conjunction with other lands, held by other grantees, at a common rent of £168 0*s.* 9*d.* In 1861, Ellen Barron, the owner of the grantee's interest in the part in question, devised the same to certain persons for life; and on the death of the survivor, to John Quinlan, absolutely. Testatrix died on the 21st October, 1861. The last life died on the 11th November, 1904, and the remainder devised to John Quinlan thereupon fell into possession. John Quinlan had been adjudicated a bankrupt on the 5th December, 1878; and a certificate that all his estate and effects, real and personal, had vested in the official and creditors' assignees, pursuant to the statute, was issued on the 11th January, 1879, and shortly afterwards was registered in the Registry of Deeds. The said reversionary interest of John Quinlan was mentioned in his statement of affairs. On the 28th September, 1880, he obtained his certificate of conformity, and died on the 30th August, 1892. By his will he devised all the residue of his real and personal estate, which included the said lands, to his daughters, Frances Quinlan and Helen Redmond, in equal shares, and declared that the share of Helen Redmond should be conveyed to the trustees of her marriage settlement upon the trusts thereby declared of the property thereby settled. When the said reversionary interest fell in in 1904, Frances Quinlan and Helen Redmond entered into possession and receipt of the rents and profits of the said lands. The said shares of Frances Quinlan and Helen Redmond were by deed of the 14th April, 1906, conveyed to the vendor in consideration of £160 paid as therein mentioned. The vendor thereupon entered into possession and receipt of the rents and profits, and subsequently sold the said lands with others in this matter. The official assignee in bankruptcy now claimed to be entitled to the net residue of the purchase-money representing the said lands, which was taken as one-eighth of the net residue of the entire purchase-money.

R. H. Macrory, for the vendor:—

The property being held under a fee-farm grant did not vest in the assignees in bankruptcy, under sect. 268 of 20 & 21 Vict. c. 60, until election, by reason of the interpretation which has been put on sect. 271 of the same Act: *Hanway* v. *Taylor* (1); *Somers* v. *M'Donnell* (2). The assignees in bankruptcy were bound to elect within a reasonable time: *Laurence* v. *Knowles* (3), *Mackley* v. *Pattender* (4). A "reasonable time" should be taken to run from the date of the bankruptcy, or at latest from the time when the interest in the property fell into possession. There was no election by the assignee until the claim was made before the examiner in the Land Commission matter. The assignees should not be allowed to elect now as against a bona fide purchaser for value.

Herbert Wilson K.C., for the official assignee:—

In *Hanway* v. *Taylor* (1) no traders' assignee was appointed, whereas in the present case there was a creditors' assignee. The registration of the order of bankruptcy was an election to take on the part of the assignees in bankruptcy. The residue should accordingly be paid to the official assignee.

WYLIE J.:— July 27.

This case raises a nice question of bankruptcy law. The facts are simple and admitted. [His Lordship stated the facts, as above set out, and continued.] The vendor resists the claim of the Official Assignee, and contends (*a*) that the bankrupt's interest in these lands was one that was burdened with onerous covenants and conditions within the decisions of *Hanway* v. *Taylor* (1) and *Somers* v. *M'Donnell* (2), and, therefore, under the Irish Bankruptcy Acts, did not pass to or vest in the assignees on adjudication, but remained vested in the bankrupt until the assignees should elect to take; (*b*) that the assignees must elect within a reasonable time, and that such time had long since elapsed; (*c*) that the assignees should not be allowed to elect now as against a bona fide purchaser for value.

(1) I. R. 8 C. L. 254.
(2) 5 N. I. Jur. 192.
(3) 5 Bing. 399.
(4) 1 B. & S. 181.

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Now, as regards the first contention, I did not understand Mr. Wilson, for the assignees, as in any way controverting it, and, in my opinion, the cases referred to clearly support it.

As regards the second contention, the first part of it, that the assignees must elect, within a reasonable time, is clearly established by authority; but the second part of it, that in this case a reasonable time had elapsed, is the one that raises the difficulty. The case of *Mackley* v. *Pattenden* (1) is very instructive on this question. There the owner of an onerous lease, that was subject to an equitable mortgage, became bankrupt in 1847, but continued in receipt of the rents and profits till his death in 1859. He bequeathed the lease to his wife, whom he appointed executrix. In 1860 the assignees, having failed to sell the lease at a price that would satisfy the mortgage, assigned the lease to the mortgagee, who brought an action of ejectment against the widow, and recovered judgment, the judge directing the jury that the assignment of the lease by the assignees was evidence of an election to take. A new trial was granted on the ground that a material question had not been left to the jury, viz., whether the assignees had elected within a reasonable time, which was a question for the jury, or, put in another way, whether, upon the evidence in the case, the jury would find that the assignees had abandoned their claim. The case clearly decided two points—first, that the legal estate in the lease continued in the bankrupt until election, and that election to take it out of him must be made within a reasonable time; but the case throws little light upon the question as to how the reasonable time in any particular case is to be determined, except that it is a question for the jury in each case. It is also important to note that the contest in that case was between a volunteer claiming under the bankrupt and a person claiming through the assignees. In this case the contest is between the assignees and a bona fide purchaser for value from the devisees of the bankrupt. And I have, therefore, to consider the question of reasonable time in conjunction with Mr. Macrory's third contention, that the assignees should not be allowed to elect now as against a bona fide purchaser for value. The cases, I

(1) 1 B. & S. 181.

think, show that the fact of the assignees standing by and permitting rights to arise as between the bankrupt and third parties is material in considering the question of reasonable time or of the abandonment of the claim.

Now, in this case, the bankruptcy occurred in 1878, and, owing to the onerous nature of the bankrupt's interest in the property, it did not pass to or vest in the assignees upon adjudication, but remained in the bankrupt until the assignees should elect to take it, unaffected by the order of adjudication, the certificate of vesting, or its registration. The certificate of vesting is expressed to be pursuant to the statute. But, though the interest of the bankrupt was reversionary, it was open to the assignees, within a reasonable time after the bankruptcy, to elect to take it, if it was of any value, and sell it for the benefit of the creditors. There is no evidence that the assignees have ever elected to take the bankrupt's interest in the lease or fee-farm grant subject to its burdens. They stood by, or did nothing to assert their claim, while the vendor in this matter purchased the bankrupt's interest in 1906, two years after it fell into possession, for £160, got the legal estate by her conveyance, entered into possession, sold to her tenants under the Land Purchase Acts, and perfected her title by a proceeding in Mr. Justice Barton's Court in 1914, and a new conveyance in 1915; and now when the fee-farm grant is at an end, all liabilities under it extinguished, except such as can be discharged out of the purchase-money, and, after paying all outgoings and costs, a surplus remains for the vendor, the present official assignee has the hardihood to come in and say: "Now I elect to take and claim this surplus and the bonus." I have no hesitation in telling him he is too late. This is a Court that favours equity, not iniquity.

Solicitors for the vendor: *Williams & Denroche.*

Solicitor for the official assignee: *Maxwell, Weldon & Co.*

J. E. W.

Barton J.
1914.
Nov. 24, 27.

Appeal.
1915.
Jan. 22.
Feb. 17.

In the MATTER of SAMUEL KISSOCK and MARY CURRIE, and the Vendor and Purchaser Act, 1874.

Vendor and Purchaser—Agreement for Sale of Leaseholds—Title—Judgment Mortgage affecting the Premises registered after Registration of Purchase Agreement, but before Conveyance—Blot on Title.

A vendor agreed with a purchaser for the sale of leaseholds. The investigation of the title disclosed an unsatisfied judgment mortgage affecting the premises, and registered prior to the conveyance to the vendor. The purchase agreement, pursuant to which the conveyance to the vendor had been made, was registered prior to the registration of the unsatisfied judgment mortgage.

The purchaser having by his requisitions required that the vendor should procure a release or satisfaction of the judgment mortgage, and the vendor having declined to do so:

Held, by the Court of Appeal, O'Brien L.C. and Moriarty L.J., *dissentiente* Cherry L.C.J. (affirming the decision of Barton J. on a vendor and purchaser summons), that a good title had not been shown.

But *held* by O'Brien L.C. and Moriarty L.J., that the questions involved were not proper to be decided on a vendor and purchaser summons.

Position of judgment creditors prior to and since the Judgment Mortgage Act, 13 & 14 Vict. c. 29, where a vendor continues in possession between an agreement for sale and actual conveyance, discussed.

Summons under the Vendor and Purchaser Act.

By an agreement in writing, dated September 11th, 1914, the vendor agreed to sell to the purchaser a house, situate in Ballymena, held under lease, dated the 28th September, 1901, for a term of ninety-one years, from May 1st, 1901, subject, in conjunction with adjoining premises, to the yearly rent of £3 12*s.*, for the sum of £150. It was agreed that a deposit of £20 should be paid by the purchaser, and that good title to the premises should be shown by the vendor from the date of this lease. The investigation of the title disclosed that the vendor had bought the premises from Minnie K. Hall, under an agreement, dated the 12th August, 1911, whereby he agreed to buy, at the price of £125, the premises, of which this house formed part, subject to a mortgage for £475. The conveyance from Minnie K. Hall to the vendor was dated the 28th August, 1911. The testatum witnessed that the assignment was made in pursuance of the

agreement of the 12th August, 1911, and in consideration of the sum of £125, "on or before the execution of these presents paid," the receipt of which was acknowledged. The agreement of the 12th August, 1911, was registered on the 15th August, 1911. The conveyance of the 28th August, 1911, was also registered. The hand searches disclosed that a judgment had been registered against Minnie K. Hall, on the 24th August, 1911, and remained unsatisfied. The present purchaser made the usual requisitions with reference to the judgment mortgage. The vendor replied: "This judgment having been registered subsequent to the registration on the 15th August, 1911, of the purchase agreement between Miss Hall and the vendor, of the 12th August, 1911, the vendor is advised that this judgment does not charge or affect his title to the property. Therefore, the vendor does not consider it an incumbrance, and declines to obtain a release, re-assignment, or satisfaction of same." The purchaser thereupon issued the present summons for an order—1, that it might be declared that the objections of Mary Currie to the title to the premises comprised in the above-mentioned contract had not been sufficiently answered, and that a good title to the premises had not been shown; 2, that the vendor must procure the release or satisfaction of the judgment of the 21st August, 1911, registered in the Registry of Deeds on the 24th August, 1911; 3, that, in the alternative, Samuel Kissock be ordered to return the deposit of £20.

It appeared from the affidavits used at the hearing, that at the date of the agreement of the 12th August, 1911, Minnie K. Hall was indebted to the vendor in the sum of £136 7*s.* 4*d.*, and that it was agreed between them that he should purchase for the sum of £125 the equity of redemption in the premises, which were subject to a mortgage for £475, and that the sum of £125 should be retained by him in part satisfaction of the debt due by her to him. The vendor also referred to an account stated between him and Minnie K. Hall, on the 23rd November, 1911, showing a number of items charged against her, and referring to a bill of sale, dated the 4th August, 1911, against her furniture. It also appeared that on the 9th July, 1912, the vendor paid off the mortgage debt of £475, and obtained a re-assignment from the mortgagees of the premises.

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The purchaser, in a replying affidavit, stated that she was not aware until she read the vendor's affidavit that the sum of £125, the consideration in the deed of 28th August, 1911, was a debt due and owing by Minnie K. Hall to the vendor existing prior to the date of the assignment; that no notice thereof was given to her; that same was inconsistent with the terms of the deed of assignment; that, if the statement of the vendor to that effect was true, it would suggest that the assignment was for a past consideration, or that it was made to secure a fraudulent preference for the vendor against the other creditors of Minnie K. Hall.

Megaw, for the purchaser:—

The question is whether a judgment mortgage on a vendor's interest, registered after the registration of the agreement for sale of an equity of redemption in lands, but before completion, takes priority over the conveyance to the purchaser. The effect of a judgment mortgage is to take out of the debtor any beneficial interest in the lands that the debtor had in him: *Tevlin* v. *Gilsenan* (1). The vendor, Hall, up to completion had a substantial interest in the property agreed to be sold: *Rayner* v. *Preston* (2). The deed, Hall to Kissock, was apparently for cash, and not for a past debt. The purchase-money could not be regarded as appropriated to the past debt till completion. A vendor is entitled to the rents and profits till completion, and can keep the lands if the conditions are not fulfilled. The judgment mortgage is a blot on the title, which ought to be removed by the vendor: *Heeney* v. *White* (3).

H. R. Poole, for the vendor:—

Hall's interest in the lands being only equitable, the agreement for sale without any conveyance was sufficient to vest in Kissock the equitable estate: Fry on Specific Performance, p. 451, par. 911. A purchaser, who is at the time seised of the legal estate as mortgagee, is not bound by judgments subsequently entered up: Sugden, Vendors and Purchasers, p. 518. If the purchase-money is paid before the registration of the judgment mortgage, the purchaser has priority over the creditor's interest in

(1) [1902] 1 I. R. 514. (2) 18 Ch. D. 1. (3) [1905] 1 I. R. 124.

the land: Williams, Vendors and Purchasers, p. 558; *Whitworth* v. *Gaugain* (1); *Finch* v. *Winchelsea* (2). The subsequent evidence shows that there was no substance in the purchaser's objection, and the title is one which the Court will consider not to be doubtful: Fry, on Specific Performance, p. 440; *Mogridge* v. *Clapp* (3); *Spencer* v. *Topham* (4); *Smith* v. *Death* (5). Judgments against mere trustees are no objection to the title; Dobbs, Judicial Sales, p. 46, note *q*.

BARTON J.:

Nov. 27.

This is a purchaser's summons to have it declared that the purchaser's objections to the title to the premises comprised in a contract of the 11th September, 1911, have not been sufficiently answered, and that a good title to the said premises has not been shown, and for a declaration that the vendor must procure a release or satisfaction of the judgment of 21st August, 1911, registered in the Registry of Deeds on the 26th August, 1911, and in the alternative that he be ordered to return the deposit of £20, with interest, from the date of the agreement.

The agreement was for the sale for £150 of a house in Ballymena, held, with other premises, under a lease for a term of years. The sale was to be completed on 1st October, 1914. The vendor was to make out good title to the premises from the date of the lease; and was to furnish hand searches in the Registry of Deeds affecting said property from the date of the lease to the date of completion.

The investigation of title disclosed that the vendor had bought the premises, of which the house formed part, from his cousin, Miss Minnie Knox Hall, under an agreement made 12th August, 1911, whereby he agreed to buy at the price of £125, the premises of which this house formed a part, subject to a mortgage for £475. The purchase was to be completed on 31st August, 1911.

The agreement was completed by deed, dated 28th August, 1911, the testatum of which witnessed that the assignment was

(1) 1 Ph. 728.
(2) 1 P. W. 277.
(3) [1892] 3 Ch. 382.
(4) 22 Beav. 573.
(5) 5 Madd. 371.

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made in pursuance of the agreement of 12th August, 1911, and in consideration of the sum of £125, "on or before the execution of these presents paid," the receipt of which was acknowledged. Both the agreement of 12th August, 1911, and the deed of 28th August were registered. The agreement was registered on 15th August, 1911.

It also appeared by hand searches that a judgment had been registered as a mortgage by one Kyle against Minnie Knox Hall on the 24th August, 1911, that is, some days before the execution by Miss Hall of her assignment to the vendor. The purchaser made the usual requisitions with reference to the judgment mortgage, to which an answer was given that the judgment had been registered after the registration of the agreement of 12th August, and did not affect the title of the property. The purchaser thereupon instituted this summons.

That answer was, I think, not sufficient. The agreement was for the sale of an equity of redemption; but unless and until the whole of the purchase-money had been paid the judgment mortgagee would have a right to as much of the purchase-money as remained unpaid after. The purchaser then issued this summons and filed her affidavit. The vendor in his affidavits, filed on the 9th and 18th November, addressed himself to this point. In these affidavits he alleged that by a verbal and collateral agreement it had been arranged between himself and Miss Hall at the time of the agreement for purchase of August 12th, that the purchase-money should be retained by him in part satisfaction of an existing debt of £136, which was due by her to him. He adds that the title had been accepted by his solicitor on 24th August. He furnished an account which was stated and settled between himself and Miss Minnie Knox Hall on 23rd November, 1911. This account does not completely corroborate the vendor's allegation, but rather suggests that the £125 purchase-money was to be credited generally to Miss Hall as against past and future advances. The purchase-money of the lands, £125, appears on one side of the account as of the date 12th August, and on the other side of the account, under date of 16th September, appear several payments for rent and outgoings of the premises which only became due on August 13th, as well as the debt of £136 7*s.* 4*d.*, described as

"amount due on a Bill of Sale of August 4th, 1911." It looks as if the purchase-money was not appropriated to the past debt until 16th September.

Mr. Megaw, for the purchaser, objects that this affidavit was not sufficient evidence that Miss Hall had no beneficial interest at the date of the judgment mortgage of 21st August. He also complains that the affidavit discloses and gives him notice of a transaction which looks not only like a fraudulent preference, but also like a deed liable to be impeached under the statute of Elizabeth. The former point would not be a valid objection, as the time has long since expired for taking advantage of a fraudulent preference. As regards the latter objection, Mr. Megaw relied on the dates. On 4th August Miss Hall gave her cousin a bill of sale on her furniture. On 7th August Kyle issued his writ. On 11th August Miss Hall agreed to assign these houses to her cousin. On 21st August Kyle got judgment. Mr. Poole, for the vendor, relies upon a class of cases of which *Smith* v. *Death* (1) and *Spencer* v. *Topham* (2) are examples, which decide that where the title depends upon a matter of fact which is capable of positive proof, and is satisfactorily proved, the purchaser will be obliged specifically to perform the contract. *Spencer* v. *Topham* (2) was a good example of that class of case. A previous vendor of the premises had been solicitor purchasing from the client. In that case the Court had a considerable mass of evidence which reasonably satisfied it that the transaction could not have been set aside by the client.

I do not think that those cases govern the present one, in which there is a registered judgment mortgage, which, having regard to the statute and to the terms of the other registered documents of title, is prima facie a blot on the plaintiff's title—an incumbrance which prima facie should be paid off or released. If the vendor asserts that such a solemn incumbrance as that is not an incumbrance at all, because of special facts, then I think that what the purchaser is entitled to get is at least some testimony reduced to writing so that it may be preserved as a muniment of title. I do not say that the vendor in this case is

(1) 5 Madd. 371. (2) 22 B. 573.

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bound to discharge the incumbrance or to get a release or to produce a satisfaction of the judgment. It is not necessary to go so far; he should produce some satisfactory evidence of the kind which I have just described. But of what value would these affidavits be if the present purchasers wished to sell the property at some future time? They would be worse than useless, for they would not merely offer no muniment of title, but might even be calculated to add fresh ground for alarm.

In my opinion the evidence that this judgment mortgage was not an incumbrance upon Miss Hall's beneficial interest in the property is not of that satisfactory kind that the Court would be justified in forcing the title upon the purchaser, and I think that the applicant is entitled to the Declaration No. 1 in the summons. I do not know whether the parties are willing to give and take an opportunity of offering further evidence. If not, I think that the purchaser will be entitled to the relief claimed in paragraphs 3 and 4 of the summons. In any event, she is entitled to the costs of this application.

D. M. S.

1915. Jan. 22. Feb. 17.

The vendor appealed (1).

In addition to the cases cited in the Court below, the following cases were referred to:—*In re Scanlan's Estate* (2); *Eyre* v. *M'Dowell*(3); *Phibbs* v. *Child*(4); *Handman and Wilcox's Contract*(5); *Rossborough* v. *M'Neill* (6); *Blake's Estate* (7).

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN L.C., CHERRY L.C J., and MORIARTY L.J.

(2) [1897] 1 I. R. 462.
(3) 9 H. L. C. 619.
(4) 3 Drew 709.
(5) [1902] 1 Ch. 599.
(6) 23 L. R. Ir. 409.
(7) [1895] 1 I. R. 468.

SIR IGNATIUS J. O'BRIEN L.C. :—

The case as argued here involves the discussion of a question of some practical importance in relation to the position of judgment incumbrances. The matter came before Mr. Justice Barton on a vendor and purchaser summons for the purpose of determining two questions, but ultimately upon the development of the case before him a third question arose for consideration. The facts of the case, so far as it is necessary to refer to them, are short. On September 11, 1914, an agreement in writing was entered into between Samuel Kissock, vendor, and Mary Currie, purchaser, by which Kissock agreed to sell to the purchaser certain premises in Suffolk Street, Ballymena, for a sum of £150. The premises were held under a lease for ninety-one years, and were subject to a rent of £3 12s. per year. It was provided by the agreement that the vendor should make good title to the premises from the date of the lease. On the 20th of September, 1914, the documents to vouch title, accompanied, as I understand, by an abstract of title, were furnished by the vendor's solicitor to the purchaser's solicitor. On the 21st of September the purchaser's solicitor made requisitions on title, two of which are most material. In No. 5 the purchaser asked—Are there any incumbrances affecting the property other than those disclosed by the abstract? The answer was—The vendor is not aware of any incumbrance affecting his title; that is, of course, any incumbrance other than those disclosed in the abstract. In accordance with the Irish practice, searches were made in the Registry of Deeds against the lands in the index of names; and a judgment-mortgage, which rests in a somewhat peculiar position, was found registered, not against Kissock, but against his immediate predecessor in title. Upon discovery of this judgment-mortgage the purchaser required it to be released, or satisfaction of the judgment procured. The vendor declined to comply with this requisition, on the ground that the judgment-mortgage having been registered subsequently to the registration of an agreement with Miss Hall (his predecessor), it did not charge or affect his title to the property. The facts as disclosed were that Kissock, the vendor in the present case, had himself entered into a contract on the 28th of August, 1911, to purchase these premises from a lady

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named Hall, and that subsequent to that contract a judgment-mortgage for a sum of £37 15*s.* 1*d.* was registered against the interest of Miss Hall; and that afterwards, in pursuance of that contract for sale, Miss Hall assigned her interest to Kissock, both sides ignoring the existence of the judgment-mortgage which had been registered in the interval against Hall's estate or interest—if it be an estate or interest. The answer accordingly amounts to this —that Kissock when he completed his purchase was not concerned with any judgment registered subsequent to the date of his agreement to purchase, inasmuch as, he says, his conveyance being without notice of the existence of the judgment-mortgage, related back to the original contract of sale, that the judgment was not, and could not be, a blot on the title, and that accordingly the purchaser from him was not entitled to have it removed or satisfied, or in any way discharged. In addition to this answer there were answers to further enquiries, but no question arises in connexion with them. They appear to have been satisfactory. The purchaser refused to accept that answer, and took out a vendor and purchaser summons to determine a perfectly net question of law, viz., whether registration of this judgment-mortgage against Miss Hall, subsequent to the date of her agreement to sell to Kissock, but before acceptance of title by him, or payment of the purchase-money, could operate in any way to affect the title of Kissock. The case, when it came before Barton J., as I learn from his judgment, was discussed entirely upon a third and somewhat different question which was raised by affidavits filed in the proceedings. These affidavits were filed to show that in equity this judgment-incumbrance could not affect the title, inasmuch as in truth and in fact, although the conveyance recited payment of the purchase-money as of the date of the conveyance, the purchase-money was practically satisfied and discharged at the time of the original agreement for purchase by him from Miss Hall.

It appears that Miss Hall's interest was only equitable because she or her predecessor in title had mortgaged the leasehold interest by conveyance, and there was due on foot of that mortgage a sum of £445. The agreement between her and Kissock was to take over the premises subject to that mortgage, the purchase being only of the equity of redemption, and it was contended that the judgment-

mortgage could not be a blot on the title because the purchase-money had in fact been paid before the registration of the judgment-mortgage. The view which Barton J. took, and to which I shall refer later on in my judgment, is one which is perfectly clear, and with which, so far as the question was before him, I agree; but in one part of his judgment I do not think he went as far as it is necessary for me to go, owing to the course which the case has taken in the Court of Appeal. He held that, even if this third question, which involved a controversy of fact, could be answered in favour of Kissock in an action, the title was not such as ought to be forced on an unwilling purchaser, and that accordingly he would make no order that would have the effect of enforcing it. I certainly think that this question could not be raised on a vendor and purchaser summons. I think Barton J. was right in saying that the case was one in which the title could not be forced upon an unwilling purchaser. I refer to this because I find that Barton J. in his judgment has stated perfectly clearly that that was the only question that was tried before him. In this court, however, we were brought back to the net question which is raised by the summons, and a determination of that question is required from us. Two views were put forward on behalf of the vendor. The first was the simple proposition that Miss Hall's interest, after she had contracted to sell, even though there was no acceptance of title or payment of purchase-money, was merely an interest in purchase-money, coupled with something in the nature of a lien on the lands, and accordingly was not such an interest as could be affected by the registration under the Judgment Mortgage Act. It was also contended that, even if it was an estate or interest that might be affected by such registration, as Kissock had no notice, as alleged, of the existence of the judgment-mortgage at the time he completed the sale, he was absolutely entitled to pay his purchase-money without regard to any judgment which in the interval of time between the agreement and acceptance of title might be registered against Miss Hall. It is essential to consider the history of the law dealing with the position of judgments both before and after the Judgment Mortgage Act (1), which is the statute at present regulating the position of judgment-creditors

(1) 13 & 14 Vict. c. 29.

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with regard to the lands of their debtors. Prior to the 1 & 2 Vict. c. 110, in England and the corresponding Act in this country, 3 & 4 Vict. c. 105, the position of a judgment creditor, having regard to the statute of Westminster, as to the lands of his debtor was this: that his lien amounted to a general equitable charge—not a specific charge on the lands of his debtor. This of course is apart from the effect of suing out a writ of elegit.

The law before 1 & 2 Vict. c. 110 had been the subject in England of numerous decisions, the effect of which is stated in Sugden's Vendors and Purchasers, at p. 518 of the last edition, which was edited by Lord St. Leonards himself:—"The operation of a contract upon judgments before the new law seems to have stood thus: a contract for sale would prevail over a subsequent judgment-creditor in equity, but the creditor would have a legal right under his judgment, and he would have an equitable right to have so much of the purchase-money required to pay his debts as remained unpaid; to the extent of the money paid before his judgment, he would be bound in equity. But if the purchaser paid any part of the purchase-money to the exclusion of the judgment-creditor, after he had notice of the judgment, he would still be bound to that extent by the debt." That was the position of the law prior to 1 & 2 Vict., where the judgment was only a general security, and we find the equitable doctrines with regard to notice in full force for the protection of a purchaser if he had paid his purchase-money without notice of a judgment registered between the date of the contract and the sale. The 1 & 2 Vict. c. 110, and our Irish statute 3 & 4 Vict. c. 105, however, made an important change. The statute, in the first place, by words which are copied verbatim into the 13 & 14 Vict. c. 29, extended the remedy of a judgment-creditor to all classes of estates or interests, whether legal or equitable, or of whatever nature they might be, getting rid of the many devices by which judgment-creditors might have been debarred of their rights against the lands. [His Lordship read sect. 22 of 3 & 4 Vict. c. 105 (1), corresponding in

(1) Section 22 of 3 & 4 Vict. c. 105 provides that:—

"A judgment already entered up, or to be entered up, against any person in any of Her Majesty's Superior Courts at Dublin shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and heredita-

substance to section 13 of 1 & 2 Vict. c. 110, and proceeded.] The effect of these Acts in England and Ireland was to change what had been previously a mere general lien of a very restricted character, subject to all the rules of equity as regards notice, and to convert a judgment properly entered up into a specific charge on the lands of the debtor. There was, however, this saving clause: "provided also that nothing herein contained shall be deemed or taken to alter or affect any doctrine of courts of equity whereby protection is given to purchasers for valuable consideration without notice." One thing is perfectly clear that, as the property which was attached specifically by the new Act was an estate or interest in land, if after the Act the judgment could operate upon whatever interest was in the vendor between the contract and acceptance of title and payment of the purchase-money, it could only have attached to it if it was an interest in land.

The position of the judgment-creditor after the Act, so far as notice was concerned, was the same as his position before the Act, because there was the saving clause in the section.

Now there is a passage in a judgment of Lord Hatherley, in *Benham* v. *Keane* (1), which suggests a view that there would not be an estate or interest in the lands in the vendor between the two dates which are so material in the present case. It is the only authority that I can find in favour of the view, and is dealt with by Lord St. Leonards, in a passage where he clearly gives his opinion that it was wrong. He says:—

"In a case [*Benham* v. *Keane* (1)], in which this doctrine was elaborately considered, the learned Judge in one passage is reported to have said that it was laid down that after a contract

ments, including lands and hereditaments of copyhold tenure of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment at any time afterwards have any disposing power which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom such judgment shall be so entered up, and against all persons claiming under him after such judgment."

(1) 1 J. & H. 685.

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for the sale of the land the debtor has no longer any interest in it, and there is therefore nothing for the judgment-creditor to take. But this carries the rule too far, and the principle is correctly laid down in the other portions of the judgment" (1).

I think it is manifest that the passage, which was unnecessary for the decision of the Vice-Chancellor, must have crept in through an error of the reporter, or, *per incuriam*, was allowed to remain by the Vice-Chancellor after revising the judgment. I think that, from the point of view of the judgment-creditor, as regulated by the statute, his debtor had an interest in land after the date of contract for sale and until completion, capable of being affected by the judgment. This, I think, was the law before the Judgment Mortgage Act, and remains the law under that statute, where the same language is used as in the repealed Act of Parliament. If the contract of sale should not be carried out, the estate of the vendor will be the same as before the contract; no doubt if the purchase-money is paid and the sale is completed he loses that estate, but meanwhile it is to my mind clearly an interest in land, and as such capable of being affected by a registered judgment. It makes no difference to my mind whether the interest is legal or equitable.

There only remains the question whether the alleged absence of notice to the purchaser in the present summons affects the question.

I certainly think that a vendor and purchaser summons is not a proper proceeding to determine such a question, but I do not rest my judgment on that. While registration is not notice, if the registration of the judgment-mortgage did affect, as I hold it does, the title of the first vendor, Miss Hall, notice or the absence of notice to Kissock cannot affect the question.

The practice is always to continue the search against the vendor to date of completion of the purchase, when, of course, the blot on the title will be disclosed, and the purchaser runs no risk.

A practice cannot alter the law, but in this case the practice is in accordance with the law. By registration the judgment-mortgagee takes whatever interest the vendor had, and I hold that this is an interest in the land. There is no statutory saving clause

(1) Sugden V. & P., p. 527, c. 13, s. 1, sub-s. 27.

for absence of notice, and while the creditor takes subject to the purchaser's rights there is no equity in favour of the purchaser that saves him from disregarding registered acts which bind the vendor's interest.

Any other view would be most inconvenient, and, I consider, is not law.

CHERRY L.C.J.:—

By a memorandum of agreement, dated the 12th August, 1911, Minnie Knox Hall agreed to sell to Samuel Kissock, for £125, the equity of redemption in four houses in the town of Ballymena, held for an unexpired term of 999 years, subject to an indenture of mortgage, dated the 25th January, 1908, made by Minnie Knox Hall to Charlotte Agnew, and to the principal sum of £475 thereby secured. The agreement provided that the vendor was to be entitled to the sub-tenant's rents up to the 21st August, 1911, and was to pay all outgoings up to the same date, and that the purchase was to be completed on the 31st August, 1911, when possession was to be given, subject to the sub-tenancies.

This agreement was duly registered on the 15th August, 1911, and the purchase was completed before the date agreed upon. The premises were, by deed, dated the 28th August, 1911, assigned to Kissock. This deed is expressed to be made in consideration of £125, "on or before the execution of these presents, paid by the said Samuel Kissock to the said Minnie Knox Hall," and contains the usual receipt for the purchase-money. It appears, however, upon the evidence that no money actually passed between the parties on the execution of this conveyance, but that Minnie Knox Hall, being indebted, at the date of the agreement, to Kissock in the sum of £136 7*s.* 4*d.*, it was agreed that the £125 should be applied in part satisfaction of this debt.

Kissock has now agreed to sell one of the houses conveyed to him by the assignment of the 28th August, 1911, to the purchaser in the present matter; and, upon the usual searches being made, it appeared that, on the 24th August, 1911, a judgment-mortgage was registered by one James Kyle against Minnie Knox Hall's

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interest in the premises for the sum of £37 15*s.* 1*d.* The purchaser now requires that a release, or re-assignment, or satisfaction of this judgment mortgage shall be procured by the vendor, and the vendor's answer to this requisition is that the judgment mortgage, having been registered subsequently to the registration of the agreement between Minnie Hall and the vendor, it does not charge or affect his title or the property.

It is our duty now to determine whether or not this answer is is good in law. I regret to say that I have come to a different conclusion on the legal aspect of the case from that arrived at by the Lord Chancellor. But the parties are entitled to the benefit of my opinion, however little value it may possess.

I do not think that the decision of Barton J. on the legal question is very satisfactory. He does not decide that the judgment mortgage affected the lands when registered, or that the vendor is now bound to discharge it, or to produce a satisfaction of the judgment. But he says that the evidence that this judgment-mortgage was not an incumbrance upon Miss Hall's beneficial interest is not of that satisfactory kind that the Court would be justified in forcing the title upon the purchaser. This is, to my mind, rather unfair to the vendor, who will be left with a cloud upon his title that will compel him practically to pay off this judgment-mortgage before he can dispose of his property. I think it is only fair to both parties that we should now face the question boldly, and decide whether the judgment-mortgage does or does not bind the vendor's estate in the lands.

The 7th section of the Judgment Mortgage Act (13 & 14 Vict. c. 29) provides that the registration of the prescribed affidavit shall operate to vest in the creditor "all the lands, tenements, and hereditaments mentioned therein for all the estate and interest of which the debtor mentioned in such affidavit shall at the time of such registration be seised or possessed at law or in equity." Now, what estate or interest *in the lands* was, on the 24th of August, 1911, vested in Minnie Knox Hall? In my opinion, none. By the mortgage to Agnew, in 1908, she had parted with her entire legal estate in the premises and retained only an equity of redemption. This equitable estate she agreed to sell to Kissocks by the agreement of 12th August, 1911. It is well-settled law that the

effect of such an agreement is to make the purchaser the owner in equity of the property, and the vendor, if he remains in possession, merely a trustee for him. That principle was laid down by Lord Cairns in *Shaw* v. *Foster* (1), and has never been questioned since. It is a principle applied every day in the case of sales under the Land Purchase Acts, where, after the agreement has been signed and approved of by the Land Commission, the purchasing tenant is treated as owner in fee simple long before the legal estate is vested in him or the purchase-money is paid. When, therefore, Minnie Knox Hall executed the agreement of the 12th August, she, in my opinion, divested herself of all interest, legal or equitable, in the premises; and after that date she retained no estate or interest in them upon which the judgment-mortgage could operate.

It is argued that, until the purchase-money is paid, some shadow of an interest remains vested in the vendor, which may be affected by the judgment mortgage; but I do not think that this is so. The most that the vendor could retain would be a lien for unpaid purchase-money, and that has never, so far as I am aware, been held to be an estate or interest in the lands which can be captured by a judgment-mortgage. In the present case, the question does not arise; for, in order to support a lien of any kind, there must be a debt due by the purchaser to the vendor. But here there never was any such debt. The consideration money for the agreement must be taken by the acts of the parties to have been retained by the purchaser in part discharge of the debt due by the vendor to him, and this arrangement appears to have been made before the written agreement for sale was executed.

The judgment-mortgagee has made no attempt to enforce his claim against Kissocks, and I do not see in what way he could possibly enforce it against a purchaser from Kissocks. It is, I think, quite clear that he could not obtain an order for the sale of the beneficial interest in the premises, while to any claim as against the purchase-money I think that the receipt in the deed of the 28th August, 1911, would be a perfect answer.

For these reasons I think that the vendor's answer to the

(1) L. R. 5 H. L., at p. 338.

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requisition was sufficient, and that (subject to any other question that may have been raised) the vendor is entitled to a declaration that a good title has been made to the premises contracted to be sold.

Moriarty L.J. (1) :—

I concur with the Lord Chancellor, and am of opinion that the judgment of Barton J. was correct, though I think it would have been better to have dismissed the summons on the ground that a summons is not the proper mode of deciding some of the questions involved. I think the vendor should have been put to an action of specific performance.

Had Miss Hall, at the date of the agreement, and before the date of the conveyance, any estate or interest which could be affected by a judgment-mortgage? There must be an estate or interest on which the statute could operate. I think she had, in equity. She was to remain in possession and to clear off all incumbrances. In law she was entitled to remain in possession till the purchase-money was paid. She had also a lien to the extent of the unpaid purchase-money. (See Dart, Vendor and Purchasers, p. 1169, 7th ed.; and Sugden, Vendor and Purchasers, pp. 517, 518.)

Solicitor for the purchaser: *John K. Currie & Sons.*
Solicitor for the vendor: *T. & D. C. Beggs.*

(1) This report of Moriarty L.J.'s judgment is taken from the Registrar's note, and was not revised by the late Lord Justice.—Ed.

IN THE MATTER OF SAMUEL KISSOCK AND JAMES TAYLOR, AND THE VENDOR AND PURCHASER ACT, 1874.

Barton J.
1915.
Nov. 17.

Vendor and Purchaser—Pending Litigation as to alleged blot on Title—Wilful Default.

The vendor offered for sale certain premises under conditions of sale which provided that, if from any cause whatever the purchase should not be completed before a named day, the purchaser should pay interest on the balance of the purchase-money from that day. On the day on which the contract was signed, a vendor and purchaser summons was issued in reference to the sale by the same vendor of another lot held under the same title, as to whether a judgment-mortgage which affected both premises took priority to the purchase agreement and was a blot on the title. This litigation delayed completion for nearly seven months. The vendor sought to excuse the delay upon the ground that he had been advised by counsel that the judgment-mortgage did not affect the premises.

Held, that the vendor was not justified in contracting to complete within the limited time specified with a cloud overhanging the title; and that the vendor had been guilty of wilful default, and that consequently the purchaser was not bound to pay interest upon the purchase-money

VENDOR AND PURCHASER SUMMONS.

By contract in writing, dated October 28th, 1914, Samuel Kissock, who had purchased from one Miss Hall by purchase agreement dated 12th August, 1911, agreed to sell to James Taylor two leasehold houses in Suffolk Street, Ballymena, for £300. The premises which were being sold originally consisted of four lots

On November 7th, 1914, Kissock's solicitors furnished to the solicitor for the purchaser the abstract of title and conditions of sale.

Condition 3 provided that the purchase of each lot should be completed on November 10th, 1914. Condition 4 was as follows:—"If from any cause whatever the purchase of any lot shall not be completed on or before the 10th day of November next, the purchaser of such lot shall pay interest on the balance of the purchase-money from the said 10th day of November, 1914, to

Barton J. 1915.

In re Kissock & Taylor's Contract.

the date of the completion of his purchase at the rate of six pounds per cent. per annum." Condition 14 was as follows:—"The vendor shall pay a proportion of all head rent and taxes affecting any lot up to the 1st day of November, 1914, and till the completion of the purchase of such lot shall be entitled to the proportion of the rent accruing out of such lot; and after the said 1st day of November, 1914, the purchaser of such lot shall pay all head rent and other outgoings payable in respect of such lot, and on payment of the balance of his purchase-money shall be entitled to the receipt of the rents and profits of such lot, but not otherwise."

On November 9th, 1914, the purchaser's solicitor delivered (*inter alia*) the following requisition (No. 11):—"Are there any incumbrances other than those disclosed in the abstract affecting the premises? If so, purchaser requires same to be discharged and the property freed therefrom." To which the vendor's solicitors replied on November 11th, 1914:—"There is a judgment-mortgage at suit of James Kyle against Ellen Hall and Minnie K. Hall registered against the premises on 24th August, 1911, but subsequent to the registration of the agreement for purchase of 12th August, 1911. Vendor has been advised by senior counsel that this judgment-mortgage does not affect the title or property of vendor."

On November 14th, 1914, the purchaser's solicitor delivered (*inter alia*) the following additional requisition (No. 3):—"As to the judgment-mortgage to James Kyle, referred to in vendor's reply (No. 11), purchaser would like to see senior counsel's opinion, which will be returned after perusal." To this the vendor's solicitors replied on November 19:—"Senior counsel's opinion is in Dublin. The question as to whether or not James Kyle's judgment-mortgage affects the property will be decided by the Court in a few days, and pending such decision the purchase may be completed." It appears that certain other premises in Ballymena held under the same lease as the premises the subject-matter of this contract were sold to one Mary Currie on 11th September, 1914, and on investigation of title in that matter it appeared that an unsatisfied judgment-mortgage had been registered on August 15th, 1911, subsequent to the registration of the purchase

agreement between Miss Hall and the vendor of August 19, 1911. The vendor had been advised by senior counsel that this judgment-mortgage did not charge or affect his title to the property. A vendor and purchaser summons in the matter of Kyle's judgment-mortgage had been issued on October 28th, 1914, at the suit of Currie.

On November 27th, 1914, Barton J. delivered a judgment *In the Matter of Samuel Kissock and Mary Currie* (1), in which he held that the judgment-mortgage affected Kissock's interest in the premises. Nothing further was done in the matter of the present purchase until December 22nd, 1914, when Taylor's solicitor received a letter from Kissock's solicitors informing him that an appeal was pending with reference to the question of the judgment-mortgage, and saying that the present matter must stand over pending the result, "unless you wish to make some progress in the meantime by having your draft assignment approved of subject thereto." The decision of Barton J. was affirmed by the Court of Appeal.

On February 17th, 1915, or March 4th, 1915, the vendor's solicitors informed the purchaser's solicitor that they were instructed to have the judgment-mortgage satisfied, and asked him to let them have the draft assignment for approval. After a lengthy correspondence between the two firms of solicitors, on June 30th, 1915, the vendor's solicitors informed the purchaser's solicitor that the vendor had executed the deed of assignment, and that on receipt of a cheque for £258 0*s.* 6*d.* they would send him the deed. On July 2nd, 1915, the purchaser's solicitor tendered to the vendor's solicitors a bank-draft for £238 15*s.*, and enclosed therewith an account in which he gave the vendor credit for the sum of £252 17*s.*, from which sum he deducted the sum of £14 2*s.*, being the proportion of the rents and profits of the said premises which the vendor had received since the said November, 10th, 1914, up to April 1st, 1915, in the case of one lot, and up to June 1st, 1915, in the case of the other. On July 3rd, 1915, the vendor's solicitors returned the bank-draft on the ground that it was for an insufficient amount. Accordingly, the purchaser caused the vendor to be served on July 17th, 1915, with a vendor

(1) Reported *ante*, p. 376.

Barton J. 1915.

In re Bissock & Taylor's Contract.

and purchaser summons which claimed an order declaring :—

1. That under the conditions of the contract and in the events that had happened the purchaser was entitled to the rents and profits of the premises from the 10th day of November, 1914, being the day fixed for the completion of the sale thereof by the contract, and that the vendor was a trustee for the purchaser of such of the said rents and profits as had been secured by him.

2. That the sum of £238 13*s.* tendered to the vendor by the purchaser on July 3rd, 1915, was sufficient to discharge the full balance then due by the purchaser to the vendor in respect of the purchase-price of the premises and of all interest therein and all outgoings payable in respect of the premises under the said contract after giving credit for the amount of the rents and profits of the premises received by the vendor from November 10th, 1914, as trustee for the purchaser as aforesaid.

3. That upon payment by the purchaser to the vendor of the said sum of £238 15*s.* within a time to be fixed by the Court, the vendor do forthwith deliver to the purchaser or his solicitor a proper conveyance of the premises in accordance with the contract, and also all documents of title relating to the premises in the possession of the vendor to which the purchaser was entitled under the contract.

4. Costs.

Pringle, for the purchaser :—

The questions arising for decision are—(I) Whether under condition 4 the purchaser is bound to pay interest to the vendor from the 10th November, 1914, until completion; and (2), If so, whether or not under condition 14 the vendor is also entitled to the rents and profits of the premises until completion. He (vendor) contends that under these conditions he is entitled both to interest on the purchase-money and to the receipt of the rents and profits.

On October 28th, 1914, on which date the vendor entered into a contract for sale of these leasehold premises, he was aware that there would be a difficulty in making title, and that litigation with reference to the judgment-mortgage might cause delay, and yet he contracted to complete the sale within twelve days—on November 10th—and he appealed from the decision of Barton J. on November 27th, causing further delay.

The words "other than the wilful default of the vendor" must be read into condition 4. The vendor was guilty of "wilful default" within the principle of decided cases. He did what a reasonable man would not do in the circumstances, and the purchaser is not liable to pay interest on the purchase-money.

In *In re Young and Harston's Contract* (1), at page 174 of the Report, Bowen L.J., in dealing with the circumstances of that case, says: "The term 'wilful default,' though one in common use in such contracts, is not a term of art. . . . Default is a purely relative term, just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction. The other word which it is sought to define is 'wilful.' It amounts" (he says, dealing with this class of case) "to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent"; and see the observations of Lindley L.J., in *In re Hetling and Merton's Contract* (2).

See also *Pelly and Jacob's Contract* (3). Applying the principle of these decisions, the rule of law appears to be that "wilful default" may exist even though the omission or neglect to do something necessary to enable a vendor to carry out the contract arises entirely from an erroneous or mistaken conclusion of the vendor on a pure matter of law. The vendor knew of the difficulty which had arisen. It was particularly presented to his mind, and his default was "wilful default" within the authorities. See the observations of Barton J., in *In re Postmaster-General and Colgan's Contract* (4); and see *In re Earl of Strafford and Maples* (5); and *In re Wilson and Stevens' Contract* (6).

See also *In re Woods and Lewis' Contract* (7); *De Visme* v. *De Visme* (8); *Williams* v. *Glenton* (9).

(1) 31 Ch. D. 168.
(2) [1893] 3 Ch. 269, at p. 281.
(3) 80 L. T. R. 45.
(4) [1906] 1 I. R. 287, at p. 297; affirmed on Appeal, 477.
(5) [1896] 1 Ch. 235.
(6) [1894] 3 Ch. 546.
(7) [1898] 2 Ch. 211.
(8) 1 M. & G. 336.
(9) L. R. 1 Ch. 200.

Barton J.
1915.
In re Kissock & Taylor's Contract.

Ellison, for vendor.

There was no "wilful default" on the part of the vendor. Completion has been delayed through no fault or neglect on his part, by reason of an adverse claim, which he had been advised by counsel was unfounded. He was entitled to rely on such advice. An honestly mistaken view does not constitute "wilful default." Such an interpretation would be a contradiction in terms, popularly speaking. *Bennett* v. *Stone* (1) supports our contention. Dealing with the facts of that case, which bears some resemblance to the present, Cozens-Hardy L.J. says (p. 526):—"I cannot regard the view taken by the vendors, acting under the advice of counsel, as to the proper form of the conveyance to be other than an honest, though mistaken, view." And he adds:—"I cannot hold that there was within the meaning of the rule any such wilful default as to exempt the purchaser from liability to pay interest."

At the moment of time when this contract was entered into there was no litigation pending, nor threat of litigation; there was no abstention from doing what was reasonable in the circumstances within the principle of the judgment of Bowen L.J. in *Young and Harston's Contract* (2). No wilful default or intentional omission is attributable to the vendor, who was justified in assuming that the opinion of counsel was right, and it was unchallenged at the time of the signing of the contract (October 28th). The vendor has done what was reasonable in the circumstances. There has been no neglect "to do something which the vendor ought to have done, having regard to his duty to the purchaser": *per* Vaughan Williams L.J., in *Bennett* v. *Stone* (3).

Barton J.:—

The question for decision is whether the vendor has been guilty of wilful default. He derived title from a Miss Hall, under a registered agreement to sell, followed by a deed of assignment. Between the date of the registered agreement and the date of the deed of assignment, a judgment was registered as a mortgage against Miss Hall's interest in the premises. With this blot on his title staring him in the face, the vendor agreed

(1) [1903] 1 Ch. 509. (2) 31 Ch. D. 174. (3) [1903] 1 Ch. 516.

to sell the premises to the present purchaser, and fixed fourteen days for completion. The judgment-mortgagee asserted his claim; and it was held by this Court, and by the Court of Appeal, that the judgment-mortgage affected Miss Hall's interest in the premises. This litigation delayed completion for nearly seven months.

The vendor excused himself on the ground that he was erroneously advised by counsel, that the judgment-mortgage did not affect Miss Hall's interest in the premises. That explains why he resisted the judgment-mortgagee's claim; but it does not justify his action in entering into an agreement to sell the premises, and in fixing fourteen days for completion, with an ominous cloud overhanging his title. Reference was made to a passage in Cozens-Hardy L.J.'s judgment in *Bennett* v. *Stone* (1), but that was a very different case.

In my opinion the vendor has been guilty of wilful default, and the purchaser is not bound to pay interest upon the purchase-money.

Solicitor for the purchaser: *W. J. Stewart.*
Solicitors for the vendor: *T. & D. C. Beggs.*

R. W. L.

(1) [1903] 1 Ch. 509, 526.

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BANKER AND CUSTOMER—*continued.*

and charged certain lands with payment of the moneys due on foot of the said covenant. By this deed the defendant *F. J.* conveyed other lands to the bank subject to redemption on payment of the same moneys; the defendant *D. Y.* charged other lands with the same moneys; and the remaining defendants postponed their interests in the mortgaged lands to the security of the bank. The deed contained a provision that no greater principal sum than £5700 should be recoverable on the security thereof, but that to that extent the same should be a continuing security to the bank as well for money due on current securities and current accounts as for money actually payable. In March, 1904, when the current account of *W. J. Y.* was largely over-drawn, the bank intimated to him that the debt must be called in and the securities realized. Subsequent to this no lodgments were made by *W. J. Y.*, and no cheques drawn by him, with the exception of certain cheques drawn by him at the request of the bank, and honoured by them, to pay rent, rates, and taxes, due in respect of the mortgaged lands. On the 17th December, 1904, the bank appointed a receiver over the mortgaged lands to the intent that he should "apply all moneys received by him as directed by sect. 24, sub-s. 8, of the Conveyancing and Law of Property Act, 1881," and from the year 1905 to the year 1910 the receiver continued in possession of the lands. The current account of the defendant *W. J. Y.* in the books of the plaintiffs was continued as an operative account. The account was balanced each half-year; interest was charged on the floating balance each half-year, and capitalized at the close of each half-year. The defendants contended that the plaintiffs were bound by the form of the account so kept, and that, after giving credit for the amounts lodged by the receiver from time to time and for the proceeds of that portion of the mortgaged lands which had been sold, £5406 *5s. 7d.* principal had been

BANKER AND CUSTOMER—*continued.*

paid off, and that the plaintiffs were not entitled to recover against the unsold lands any greater sum for principal than £293 14*s.* 5*d.*, being the difference between the said sum of £5406 5*s.* 7*d.* and the sum of £5700, the limit of principal money recoverable as fixed by the mortgage:—*Held*, by O'Connor M.R., that the plaintiffs were bound by the form of the account so kept by them, and that the accounts in this action should be directed on that basis. *Held*, by the Court of Appeal (Sir Ignatius J. O'Brien L.C. and Molony L.J., Cherry L.C.J. dissenting), varying the order of the Master of the Rolls, that, notwithstanding the mode in which the accounts had been kept by the bank up to the time of action brought, the bank was entitled to have an account taken in the action on the basis that the current account of *W. J. Y.* was closed on the date of the appointment of the receiver, and that the account as from that date should be taken as an ordinary mortgagee's account. *Hibernian Bank* v. *W. J. Yourell and others*

[M.R. 312; App. 321

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COUNTY COURT JURISDICTION—Administration Suit in Civil-bill Jurisdiction in which Personal Representative resided, *but not that in which Deceased had last Place of Abode or Defendant resided—County Officers and Courts (Ireland) Act,* 1877 (40 & 41 *Vict. c.* 56), *s.* 40 (*c*), (*h*)—*County Court Amendment (Ireland) Act,* 1882 (45 & 46 *Vict. c.* 29), *s.* 10 (*a*).] A suit for the administration of the personal estate of a deceased person was brought by the personal representative against one of the next-of-kin in the civil-bill Court of the county of C., within the jurisdiction of which the plaintiff resided. The deceased had not her last place of abode or business in county C., nor did the defendant reside in that county:—*Held*, that the county court judge of county C. had no jurisdiction to hear the case. *Drake* v. *Gaynor* - ROSS J. 92

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See PRACTICE—INJUNCTION

COURTS (EMERGENCY POWERS) ACTS [265
See PRACTICE — COURTS (EMERGENCY POWERS) ACTS.

ELECTION BY ASSIGNEES IN BANKRUPTCY - - - - 371
See BANKRUPTCY—ASSIGNEE.

1. ELECTION, DOCTRINE OF—Will—Legacy—Intention—*Bequest to Wife of Legacy payable out of Shares standing in joint names of Husband and Wife—Bequest of Life Estate in Residue to Wife.*] A testator whose property at his death (exclusive of certain stocks and shares standing in the joint names of the testator and his wife, which at his death became, by survivorship, the absolute property of his wife) amounted in value to £1858, by his will gave his wife a legacy of £3000, "same to be paid to her either in cash or in such of my shares (including shares standing in her name jointly with mine) as she may select," and directed his executors to hold the residue of his property upon trust to pay the income to his wife during her life, and after her death to apply two-thirds in favour of a brother's children, and to hold one-third on an educational trust. *Held*, that the wife was bound to elect between the benefits conferred by the will, and her claim to any of the stocks and shares invested in the joint names of herself and testator. *In re Sullivan; Sullivan* v. *Sullivan* - BARTON J. 248 (Aff.)

2. —— Policy payable to widow - - 57
See HUSBAND AND WIFE. 2.

ESTATE DUTY—Expense of proof of payment of - - - - - 241
See VENDOR AND PURCHASER—TITLE. 1.

ESTATE IN TAIL SPECIAL - 30
See WILL—ESTATE IN REALTY. 1.

ESTATE PUR AUTRE VIE—Devolution of Estate—*No words of Limitation—Special Occupant—Intestacy.*] A lease of lands which had been demised to the lessee, his heirs, and assigns for three lives or thirty-one years, conveyed the lands by deed to *M.* to hold the same unto and to the use of *M.* for the existing lives, without using words of limitation. *M.* afterwards died intestate as regards the lands:—*Held*, that *M.*'s interest in the lease passed on his death to his personal representative, and not to his heir-at-law. *In re Murray, Murray* v. *Condren* [BARTON J. 302

EVICTED TENANT—Person nominated by Estates Commissioners as Personal Representative—*Trustee—Power of Sale—Conveyance of Beneficiary — Personal Representative, "as beneficial Owner."—Evicted Tenants (Ireland) Act,* 1907 (7 *Edw.* 7, *c.* 56).] A person nominated as personal representative of a deceased evicted tenant under sect. 2 of the Irish Land Act, 1903, and sect. 17 of the Irish Land Act, 1909, has all the powers of a personal representative, including a power of sale for the purpose of distributing the

EVICTED TENANT—*continued.*
proceeds among the next-of-kin of the deceased evicted tenant. One of the next-of-kin of a deceased evicted tenant who had been nominated by the Land Commission as personal representative of a deceased evicted tenant conveyed "as beneficial owner" the holding of the deceased evicted tenant to a purchaser. *Held*, by the Court of Appeal, affirming Barton J., that all the interest of the personal representative as such passed to the purchaser. *Ryan* v. *Burke*.
[Barton J. 353; App. 358

HEIRSHIP—Expense of verification of fact of [241
See Vendor and Purchaser—Title. 1.

1. HUSBAND AND WIFE—After-acquired Property — Covenant to Settle — *Bequest of Share of Residuary Estate on trust to purchase Annuity.*] A marriage settlement contained a covenant by the wife, *W. P.*, to vest in trustees, to be held on the trusts of the settlement, any real or personal property of the value of £200 and upwards, of which she might during the marriage become seised or possessed, or have an absolute power of disposing. A testatrix left a moiety of her residuary estate (which moiety exceeded £200 in value) to her trustees upon trust to apply it in the purchase of an annuity for *W. P.* during her life:—*Held*, that this moiety of the residuary estate was captured by the covenant to settle. *In re Dowding's Settlement Trusts, Gregory* v. *Dowding*, [1904] 1 Ch. 441, distinguished. *In re Butler*; *Beatty* v. *Vance* - Barton J. 66

2. HUSBAND AND WIFE—Married Woman Restraint on Anticipation — *Election—Compensation — Widow — Removal of Restraint on Anticipation.*] By a post-nuptial settlement, a husband and wife settled, *inter alia*, a policy of insurance on the husband's life upon trust for the wife during widowhood and after her death for the children of the marriage. Under the provisions of the policy the proceeds of the policy were, on the husband's death, payable to the widow, and the policy contained a condition against assignment or attempted assignment:—*Held*, that there was a restraint on anticipation, and that the settlement was ineffective so far as the policy was concerned. *In re Lavender's Policy*, [1898] 1 I. R. 175, followed. *Held*, further, that the widow was put to her election. *Haynes* v. *Foster*, [1901] 1 Ch. 390, not followed. *In re Tongue*, [1915] 1 Ch. 390; *In re Hargrove*, [1915] 1 Ch. 398, followed. *Bolster* v. *Bolster* - - - Barton J. 57

HUSBAND AND WIFE—Trust to pay sum of money to wife in event of husband's insolvency—How far valid - 337
See Marriage Settlement.

ILLEGITIMATE CHILD - - 364
See Will—Words. 1.

IMPLIED TRUST—Power in the nature of trust - - - - - - 289
See Will—Power.

INJUNCTION—Probate jurisdiction—Remitted Case - - - - - - 27
See Practice—Injunction.

INTEREST on amount underpaid on allocation by Court in administration of intestate's estate - - - - - - 253
See Practice—Administration of Intestate's Estate.

—— on Purchase-money—Purchase of estate by Congested Districts Board. 153, 162
See Land Purchase Acts—Interest on Purchase-Money.

JUDGMENT-MORTGAGE—Position of judgment-creditors - - - 376, 383
See Vendor and Purchaser—Title. 2

—— Proceedings to realize—Courts (Emergency Powers) Acts - - - 265
See Practice—Courts (Emergency Powers) Acts.

LABOURERS (IRELAND) ACTS — Land acquired compulsorily on Lease — Right to Re-conveyance—*Local Government — Labourers Acts—Failure of District Council to make arrangements for erection of Labourers' Dwellings within two years — Labourers (Ireland) Act*, 1885 (46 & 47 *Vict. c.* 60), *s.* 15—*Labourers (Ireland) Act*, 1885 (48 & 49 *Vict. c.* 77), *s.* 4 — *Statute — Construction — Incorporation.*] The provisions of s. 15 of the Labourers (Ireland) Act, 1883, which enable the former owner of land, compulsorily acquired in fee by a district council for the purpose of the Act, to require the land to be reconveyed to him upon failure by the district council to make arrangements for the erection of the labourers' dwellings within two years after the confirmation of the Provisional Order, are not extended by s. 4 of the Labourers (Ireland) Act, 1885, so as to apply to lands compulsorily acquired for a term of years under that section. *Fee* v. *Ballymahon Rural District Council.* - App. 97

LAND LAW ACTS — FAIR RENT — New Sub-tenancies created by Lessee in part originally sublet—*Right of Lessee on Expiration of Lease to have fair rent fixed on remainder of Holding — Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *s.* 7, *sub-s.* 3.] Where by a lease lands are demised subject as to a part thereof to subtenancies, and such part is sub-let at the expiration of the lease, the lessee is entitled under sect. 7, sub-sect. 3, of the Land Law (Ireland)

LAND LAW ACTS—*continued.*

Act, 1896 (2), to have a fair rent fixed on the remainder of the lands, being in his occupation, notwithstanding that the original sub-tenancies had determined during the currency of the lease, and new sub-tenancies had been created by the lessee, without the consent of the lessor, in the part sub-let at the date of the lease. *Blakes, Tenants; Sampson, Landlord* - - APP. 104

LAND PURCHASE ACTS—BONUS -**Sale of Holding, including Landlord's Turbary** *Rights not comprised in Tenancy — Sale for one entire Sum, no portion of Price being "earmarked" as the Purchase-money of the Turbary Rights—Percentage Scale under Schedule* 1 *to Irish Land Act,* 1909.] A tenant bought his holding from his landlord for £2,100, the Land Commission advancing £1,700, and the tenant paying £400 into Court. Within the ambit of the tenant's holding, but not forming part of his original tenancy, was a large tract of bog, which was included in the purchase agreement, but nothing was said in the agreement as to any "earmarking" of the two sums. If the purchase price of the holding was £1,700, a bonus at the rate of 8 per cent. was payable to the landlord under schedule 1 to the Irish Land Act, 1909; if, on the other hand, the purchase price was £2,100, no bonus was payable:—*Held*, that the sums of £1,700 and £400 could not be "earmarked" as the respective prices of the holding and the landlord's turbary rights; that the purchase price of the holding was £2,100; and that consequently no bonus was payable. *Ormathwaite's Estate.* - Ross J. 62

LAND PURCHASE ACTS — INCUMBRANCE—*Sale—Mortgage—Covenant by Mortgagor to give twelve months' Notice of Intention to pay off, or to pay twelve months' Interest in lieu thereof—Clog on Equity of Redemption—Irish Land Act,* 1903, *sect.* 24, *sub-s.* 6. A mortgagor of lands sold the lands under the provisions of the Irish Land Act, 1903. The mortgage, made in the year 1900, contained a proviso that, if interest were duly paid, the mortgagee should not require payment of the principal for ten years, or after that period without twelve months' notice; and a proviso that the mortgagor should not be at liberty to pay off any part of the principal before the expiration of ten years, nor after the expiration of that period without giving twelve months' notice; and a further proviso that, in the event of the mortgagees having (owing to a compulsory sale or otherwise) to accept payment without having received twelve months' notice in writing of intention to pay same, they should be entitled to twelve months' interest in addition to the principal and interest payable under the mortgage. No actual notice of intention to pay was served on the mortgagees, but more than twelve months expired between the service of the final notice to incumbrancers and the distribution of the purchase-money:—*Held* by the Court of Appeal (reversing the decision of Wylie J.), that the proceedings in the Land Commission did not amount to notice to the mortgagees within the meaning of the covenant, and that they were accordingly entitled to be paid out of the proceeds of the sale twelve months' interest in lieu of notice, in addition to the amount of the principal and interest then due under the mortgage, and costs. *In re Kennedy's Estate,* 32 I. L. T. R. 115, not followed. *In re Fortescue's Estate.* - - WYLIE J. 269. APP. 273

LAND PURCHASE ACTS—INTEREST ON PURCHASE-MONEY — Purchase by Congested Districts Board—*Irish Land Act,* 1903 (3 *Edw.* 7, *c.* 37), *s.* 24, *sub-ss.* 2, 3—*Irish Land Act,* 1909 (9 *Edw.* 7, *c.* 42), *ss.* 26, 60. The Congested Districts Board had, pursuant to s. 60, sub-s. 1, of the Irish Land Act, 1909, sent a final offer in writing to the owner of an estate for the purchase of it, and this offer had been accepted. On the 29th January, 1914, the Land Commission made an order vesting the estate in the Congested Districts Board, and an order for the payment of the purchase-money into the Bank of Ireland, and attaching claims to it. The vendor now claimed from the Congested Districts Board interest at the rate of 3½ per cent. from the date of the vesting order and payment into the Bank, until the distribution of the purchase-money. *Held*, by the Court of Appeal, reversing the decision of Wylie J., that s. 26 of the Irish Land Act, 1909, applies to a sale to the Congested Districts Board, and that therefore the Board were not bound, in the absence of agreement, to pay such interest. *Earl of Erne's Estate.* . . . WYLIE J. 153. APP. 162

LAND PURCHASE ACTS — SUPERIOR INTEREST—Order attaching Claims to Purchase-money—*Fee-simple Head Rent—Conversion—Irish Land Act,* 1903 (3 *Edw.* 7, *c.* 37), *s.* 16, *sub-s.* 1; *s.* 24, *sub-s.* 1. Where on the sale of an estate under the Land Purchase Acts the lands are vested in the tenant-purchasers, and the purchase-money is paid into the Bank of Ireland and an order made attaching claims thereto, pursuant to the provisions of sect. 24, sub-s. 1, of the Irish Land Act, 1903, the claim in respect of a fee-simple head rent theretofore payable out of the lands is thereupon converted into a personal claim. *Frewen* v. *Frewen* (L. R. 10 Ch. 610) applied. *In re Rynd's Estate.* - - - WYLIE J. 230

LAND PURCHASE ACTS — TURBARY REGULATIONS—*Sale of Holding to Tenant—Holding comprising Bog—Right of Estates Com-*

LAND PURCHASE ACTS—*continued.*

missioners to make Regulations giving Turbary Rights over Bog to Occupier in neighbourhood after Vesting Order or Fiat—Right to rescind or vary Regulations—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 21—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 33, sub-s. 3.] In the case of the sale of an estate under the Land Purchase Acts, where portion of a holding consists of bog, and the purchaser had not an exclusive right of turbary before such sale, the power of the Estates Commissioners to make regulations under s. 21 of the Irish Land Act, 1903 (1), authorizing the cutting or making of turf on such bog by any occupiers of land in the neighbourhood of the holding for whose requirements such turf appears to be necessary, is not confined to the period prior to the vesting order or fiat, but such regulations may be made subsequent to the completion of the purchase, notwithstanding that there was no express reservation of turbary rights in the vesting order or fiat. The Estates Commissioners may from time to time rescind, amend, or vary such regulations. *In re King Harman's Estate*, [1908] 1 I. R. 202, not followed. *J. C. R. Scott's Estate*

[WYLIE J., 180 APP. 185

LEASE FOR LIVES—*Devolution of* - 302
See ESTATE PUR AUTRE VIE.

1. LOCAL REGISTRATION OF TITLE—**Proceeds of Freehold Registered Land** *applicable as realty towards payment of debts—Administration—Effect of Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 66)—*Order of Assets—Will—Construction—Mixed Fund of Real and Personal Estate.*] A testatrix by her will directed her executor to pay all her debts, and devised and bequeathed to him all her property of every nature and kind which she should be possessed of at the time of her death, making him universal legatee and devisee, and directing him to convert all her said property and apply same for Masses. Testatrix's assets included a farm of land purchased under the Land Purchase Acts, and duly registered in testator's name under the provisions of the Local Registration (Ireland) Act, 1891. Testatrix died within three months after the execution of the will, and the charitable gift failed as regards testatrix's land. Questions arose as to the order in which testatrix's realty and personalty should be applied towards the payment of debts.

Held, (1) that having regard to the proviso contained in sub-s. 3 of sect. 86 of the Local Registration of Title (Ireland) Act, 1891, the testatrix's registered lands should be treated as real estate for the purpose of ascertaining the order in which the real and personal estate of the testatrix were respectively applicable towards the payment of debts; but (2) that the testatrix had created a

LOCAL REGISTRATION OF TITLE—*cont.*

mixed fund for the payment of debts, consisting of all the realty and personalty of which she was possessed at her death, and that the debts were payable out of the realty and personalty *pro rata*. *Luckcraft* v. *Pridham*, 48 L. J. Ch. 636, distinguished. *Allan* v. *Gott*, L. R. 7 Ch. 439, applied. *Leonard* v. *Dowling* - BARTON J. 359

2. LOCAL REGISTRATION OF TITLE—**Rectification of Register**—*Land Registry—Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 66), *s.* 34 (2)—*Powers of Land Judge.*] The Court has power under the 34th section of the Local Registration of Title (Ireland) Act, 1891, to decide, as between the parties to an instrument or transaction registered, any question which may arise as to its construction or effect, and to rectify any error which may have occurred in the course of registration, if such error can be corrected without injuriously affecting any person who is not a party to the instrument or transaction. Statement of the protections provided by the Act for persons whose interests may be affected under a system of land registry with conclusive title. *In re Michael Walsh* - MADDEN J. 40

MARRIAGE SETTLEMENT—**Trust to pay a sum of money to Wife in the event of husband becoming insolvent**—*Wife's Fortune paid to Husband—Settlement of Husband's Property—Limitation to husband for life determinable on Insolvency—Valid trust for Wife only to the extent of her Fortune.*] A trader by marriage settlement dated February 10, 1897, and in consideration of £500 paid to him as his wife's fortune, assigned to trustees the premises in which he resided and carried on business, together with the goodwill of the business, stock-in-trade, and trade debts (including future acquired property), on trust "for and during his life, or until he should become bankrupt or become insolvent in his circumstances, or effect or attempt to effect a composition with his creditors, or have judgment marked against him, or do or suffer any act, deed, or thing whereby the property might, if belonging absolutely to him, become vested in or payable to any person or persons"; and from and after the determination of the trust in his favour upon trust to enter upon and sell the trust property, and out of the proceeds of sale to pay the trade debts then due (i.e., at the date of the settlement); and in the next place to pay to his wife, if living, the sum of £1000 for her separate use, and to pay the surplus (if any) to him, his executors, administrators, and assigns. The settlor also assigned to the trustees a policy of insurance on his own life for £500 upon trust out of the proceeds to pay to his wife, if surviving, the deficiency (if any) in the sum of £1000 to be paid to her out of

MARRIAGE SETTLEMENT—*continued.*

the trust property, and to hold the residue in trust for the settlor, his executors, administrators, and assigns. The settlor carried on the business on the premises until 1913, when he was declared by order of the Lord Chancellor a person of unsound mind, and his wife was appointed committee of his person and estate, and authorized to carry on the business. It was then found that the settlor had become insolvent. It became necessary to determine what were the legal rights against the settlor's assets of his creditors and of his wife, and a summons to determine them was accordingly taken out. *Held*, (1) that the trust to raise £1000 for the wife in the event of her husband's insolvency was only valid to the extent of £500, the amount of her fortune paid to him; and (2) that the claim of the wife to the extent of £500 took priority so far as the settled property was concerned over the general creditors of the husband. *Casey's Trusts*, 4 Ir. Ch. R. 247, followed. *Doherty* v. *Power* - - M.R. 337

MARRIED WOMAN—Restraint on Anticipation - - - - - - 57
See HUSBAND AND WIFE. 2.

MORTGAGE—GENERAL—Order for delivery of possession to mortgagee - 70
See PRACTICE—ORIGINATING SUMMONS.

—— To secure Bank Account—Mode of taking account - - - - 312, 321
See BANKER AND CUSTOMER.

—— Stipulation not to pay off without a year's notice, or payment of a year's interest in lieu thereof—Payment on Final Schedule in Land Commission Court 269, 273
See LAND PURCHASE ACTS — INCUMBRANCE.

MORTGAGE—JUDGMENT-MORTGAGE 376, 382
See VENDOR AND PURCHASER—TITLE. 2.

ORIGINATING SUMMONS—Withdrawal of —Practice - - - - - 121
See SETTLEMENT—CONSTRUCTION.

PERCENTAGE UNDER LAND PURCHASE ACTS on Purchase Money
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PERSONAL REPRESENTATIVE of evicted tenant—Powers of - - 353, 358
See EVICTED TENANT.

POLICY OF INSURANCE—Payable to wife with restraint on anticipation - 57
See HUSBAND AND WIFE. 2.

POSTMASTER-GENERAL — Liability of, to pay Costs *in Proceedings under the Telegraph Act*, 1878 (41 & 42 *Vict. c.* 76), *s.* 11—*Purposes for which Postmaster-General is a Body Corporate—Costs—Crown.*] In proceedings taken by the Postmaster-General under s. 11 of the Telegraph Act, 1878, costs may be awarded against him if unsuccessful. The purposes for which the Postmaster-General is constituted a body corporate considered. *The Postmaster-General* v. *Great Southern and Western Railway Company* [M. R., C. A. 74, 83

POWER in the nature of trust - - 289
See WILL—POWER.

POWER OF APPOINTMENT—Non-exercise of Power, Implied Trust - - 289
See WILL—POWER

POWER OF SALE—Nominated Personal Representative of deceased evicted tenant
See EVICTED TENANT. [353, 358

PRACTICE — ADMINISTRATION of Intestate's Estate — Interest allowed on Amount underpaid — *Allocation of Funds between Next-of-Kin—Partial Division of Assets in unequal Amounts.*] By an order made on further consideration in a suit for the administration of the personal estate of an intestate, a partial division between the plaintiff and the defendant (the only next-of-kin) of assets consisting of mortgage debts and Consols was made, but in unequal amounts, the value of the assets transferred to the defendant being less than those transferred to the plaintiff. The final allocation schedule provided for payment to the defendant out of the funds in Court of the sum of £916 8*s.* 1*d.*, being the amount by which he was underpaid, and for division of the residue between the plaintiff and the defendant. The defendant claimed in addition interest on the £916 8*s.* 1*d.* from the date of the order on further consideration. *Held*, that the defendant was entitled to payment of interest on the £916 8*s.* 1*d.* at 4 per cent. from the date of the order on further consideration. *Nunan* v. *Murphy* - - - - - Ross J. 253

2.—— PRACTICE— ADMINISTRATION —Mortgage—*Sale of mortgaged Property—Insolvent Estate—Secured Creditor—Salvage Creditor—Proof, Withdrawal of—Costs.*] In an administration suit, by the decree on further consideration, the plaintiff was declared a salvage creditor, and a Mrs. G. was found to be the first mortgagee of premises which were ordered to be sold. Both the plaintiff and Mrs. G. proved against the general personal estate. The estate turned out to be insolvent. Mrs. G. applied for liberty to withdraw her proof of debt against the general personal estate and rely on her security in order to get the

PRACTICE—*continued.*

benefit of the rule in *Hilliard* v. *Moriarty*, [1894] 1 I. R. 316, 319. *Held*, that the applicant was entitled under the circumstances to withdraw her proof of debt on payment of the costs of the application, and that the fact that the plaintiff was a salvage creditor did not prevent the application of the rule in *Hilliard* v. *Moriarty*, [1894] 1 I. R. 316, 319. *Clark* v. *Doherty* - BARTON J. 257

PRACTICE — COURTS (EMERGENCY POWERS) ACTS, 1914 to 1916 (4 & 5 *Geo.* 5, *c.* 78), *s.* 1, *sub-s.* 1; (6 *Geo.* 5, *c.* 18), *s.* 1, *sub-s.* 1 (*b*)—**Judgment Mortgage**—*Judgment—Contract—Originating Summons by Mortgagee for a Sale—Leave to institute Proceedings.*] Under the provisions of sect. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1914, as extended by the Courts (Emergency Powers) Act, 1916, sect. 1, sub-s. 1 (*b*), it is necessary to obtain the leave of the Court before instituting proceedings to raise by sale the amount of a judgment mortgage, even though the judgment on which the mortgage was founded was obtained after the 4th August, 1914, where the debt in respect of which the judgment was obtained was due under a contract made before that date. *O'Flaherty* v. *Gethings* - - - - - BARTON J. 265

PRACTICE — INJUNCTION — Remitted Probate Action—*Civil Bill not issued, and no Sessions pending—County Officers and Courts (Ireland) Act*, 1877 (40 & 41 *Vict. c.* 56), *s.* 44—*Jurisdiction of the Lord Chancellor.*] The jurisdiction given to the Lord Chancellor by section 44 of the County Officers and Courts (Ireland) Act, 1877, to grant an injunction during the intervals between the sittings of the Civil Bill Court, is confined to proceedings in equity; and, therefore, where a contentious probate cause is sent to the Civil Bill Court under sect. 63 of the Court of Probate Act (Ireland), 1857, there is no jurisdiction under sect. 44 of the County Officers and Courts (Ireland) Act, 1877, to grant an injunction during an interval between the sittings of the Civil Bill Court restraining the defendant from interfering with the assets, pending the hearing of the suit. *Semble*, the proper course in such a case is to apply to the judge of the King's Bench Division (Probate). *Graham* v. *Eakin*. - - - - - Ross J. 27

PRACTICE — TRIAL OF ISSUES BETWEEN CO-DEFENDANTS—Claim by a Defendant against a Co-defendant—*Supreme Court of Judicature (Ireland) Act*, 1877 (40 & 41 *Vict. c.* 57) *s.* 27, *sub-s.* 3.] The plaintiff brought an action against four defendants, *D.*, *B.*, *M.*, and *J.*, in which she sought to have it declared that she was entitled to an undivided share of certain lands, and claimed an account of the rents and profits of the said lands received by the defendants or any of them, and payment of her share thereof. In her statement of claim she alleged that the defendant *D.* had received and retained the entire of the rents and profits of the said lands since the 25th June, 1912, and had never accounted for the same. The defendants, *D.* and *M.* did not enter any appearance to the writ. The defendants *B.* and *J.* appeared, and delivered a joint defence, in which, after denying that they, or either of them, had received any part of the rents and profits of the said lands, they claimed to be entitled to certain shares respectively of the said lands, and of the rents and profits thereof received by the defendant *D.* since the 25th June, 1912, and stated that at the trial of the action they would apply for an order declaring that they were entitled to the aforesaid respective shares of the said lands and of the rents and profits thereof, and directing the defendant *D.* to pay them respectively similar parts of the amount which should be found to have been received by her in respect of the rents and profits of the said lands since the 25th June, 1912. On a motion on behalf of the defendants *B.* and *J.*, the Court made an order declaring that delivery of their defence to the defendant *D.* should be deemed notice to her, under the Supreme Court of Judicature (Ireland) Act, 1877, s. 27, sub-s. 3, of their respective claims against her mentioned in their said defence, and that the questions in the action between them and her should be determined in the action. *Lindesay* v. *Darlington and Others.* [M. R. 299

PRACTICE — ORIGINATING SUMMONS —Mortgage—Order for Delivery of Possession to Mortgagee—*Order LV, r.* 7. The defendant, in the year 1904, had executed a mortgage of a house to the plaintiff. No part of the principal had been paid, and a large sum was due for arrears of interest. There was no prospect of the defendant being able to pay the amount due. The defendant was in possession of and residing in the house, and it was stated in an affidavit made by a local auctioneer that it would be difficult, if not impossible, to sell the premises while the defendant remained in possession. The plaintiff applied by originating summons, under Order LV, r. 7, for an order for delivery of possession, in order to exercise the power of sale in the mortgage. *Held*, that although such order will not be granted as a matter of course, the case was a proper one for the exercise of the jurisdiction. *Bunyan* v. *Bunyan.* [BARTON J. 70

—— **ORIGINATING SUMMONS** — Withdrawal of - - - - 121
See SETTLEMENT—CONSTRUCTION.

PRACTICE—STAYING PROCEEDINGS—*Transfer of Chancery Action to County Court—County Officers and Courts (Ireland) Act*, 1877 (40 & 41 *Vict. c.* 56), *s.* 36. The plaintiff had brought an action in the Chancery Division claiming a declaration that the defendant held certain lands as yearly tenant to the plaintiff with a limited right to graze cattle over other lands, and an injunction. The defendant, who claimed a larger right of grazing, having applied to have the action transferred to the county court, the Court made an order, *in invitum* the plaintiff, staying the action, and giving the plaintiff liberty to proceed by ejectment in the county court in respect of the lands. *Held*, by the Court of Appeal, that there was no jurisdiction to make such order. The judgment of O'Brien L.C. in *Fanning* v. *New Ross District Council*, 47 I. L. T. R. 212, explained. *La Primaudaye* v. *Conway*. - - - - - - APP. 307

PRECATORY TRUST - - - 21
See WILL—CONSTRUCTION.

PRINCIPAL AND AGENT—Action for Account by principal - - 233–236
See COSTS—ACTION FOR ACCOUNT.

PRINCIPAL AND SURETY—Liability of Surety limited in amount—*Collateral Security* pro tanto *for Debt of Mortgagor—Right of Surety on Payment of Part of Debt.*] *A.*, the owner of lands mortgaged to the defendants for £13,000, demised part to *B.* for a term of years at the rent of £150. *A.* then agreed to sell to B., under the Purchase of Land (Ireland) Act, 1885, the part so demised, for the sum of £3,000, to be secured by an instalment mortgage for that amount to the Irish Land Commission, and *B.* agreed to charge the part sold to him with £500 as collateral security *pro tanto* with the rest of the lands comprised in the mortgage to the defendants. In order to carry out this agreement the defendants joined in the conveyance, free from all incumbrances, of the part agreed to be sold to *B.*, and *B.* mortgaged it to the Irish Land Commission to secure repayment of the £3,000 by half-yearly instalments. *B.* then, by a mortgage which recited the above transactions and that the debt due by *A.* had been reduced to £11,200, conveyed the part sold to him to the defendants, subject to redemption on payment of £500 and interest thereon. Years afterwards the plaintiffs, in whom B.'s interest in the lands had become vested, sold the lands, subject to the annuity payable to the Irish Land Commission but free from all incumbrances, for £750, and on completion of the sale paid to the defendants the £500 and interest due under the mortgage made by *B.* Subsequently most of the remaining lands of *A.* were sold under the Purchase of Land (Ireland) Acts, and the defendants received out of

PRINCIPAL AND SURETY—*continued.*
the purchase-money considerable sums on account of their mortgage debts, leaving a balance still due to them. The plaintiffs brought this action against the defendants, claiming the benefit of all securities held by the defendants in respect of the said mortgage debt, and the benefit of all moneys received by the defendants on foot of the said debt in the proportion which the sum of £500 bore to the total of the said debt, on the ground that the plaintiffs were sureties for part only of the mortgage debt, and that, having paid that part, they were entitled to stand *pro tanto* in the shoes of the defendants, the principal creditors:—*Held* (1) That *B.* had an interest in the transaction, namely, the acquiring of the lands free from the mortgage save as to £500, and was therefore not a surety, but a principal debtor. (2) That even if *B.* could be regarded as a surety, he was not surety for part of the debt only, but for the whole debt, with a liability limited to £500, and that therefore the plaintiffs were not entitled to any relief, as the whole debt was not repaid. *Huggard* v. *Representative Church Body* - - - M.R. 1

PROBATE ACTION REMITTED—Injunction - - - - - - 27
See PRACTICE—INJUNCTION.

RECTIFICATION of Local Register of Title—Principles governing - - 40
See LOCAL REGISTRATION OF TITLE. 2.

RESTRAINT ON ANTICIPATION — Removal of - - - - - 57
See HUSBAND AND WIFE. 2.

RESULTING TRUST - - 121, 140
See SETTLEMENT—CONSTRUCTION.

RULES AND ORDERS—Or. LXV, r. 3 [233, 236
See COSTS—ACTION FOR ACCOUNT.

SALVAGE CREDITOR - - - 257
See PRACTICE—ADMINISTRATION.

SETTLEMENT — AFTER-ACQUIRED PROPERTY—Covenant to settle 66
See HUSBAND AND WIFE. 1.

SETTLEMENT — CONSTRUCTION — Resulting Trust—*Charges on Real Estate settled—Income for the person for time being entitled to the Real Estate, during certain lives—Corpus, on death of surviving life, for the person then entitled to the Inheritance, and to merge—Trust in event of Sale of Real Estate for Payment of Incumbrances—Voluntary Sale while one of the lives in being—Originating Summons—Withdrawal of—Practice.*] A testator devised his real estates to the use of the eldest of his three grandchildren, a minor, for life, with remainder to the use of his first and other sons in tail, with remainder to the use of his

SETTLEMENT—*continued.*

daughters as tenants in common in tail, and in default of such issue for like estates successively to his remaining grandchildren and their issue. The will contained a name and arms clause, and provisions as to management during minority. The testator died in April, 1859. At the time of his death he was indebted to his sister in a certain sum, which under the provisions of the will became a charge on the real estate. The real estate was already heavily incumbered. By indenture of settlement made in September, 1859, the sister of the testator proceeded to settle the charge, and after reciting that the trustees named in the will were unwilling to act, and that, in consideration of the love and affection which she bore to the grandchildren of the testator, she was desirous that the trustees of the will should act, and in consideration of their assenting so to do, and in order to enable them to manage the said real estates for the benefit of the persons interested therein under the will, and to prevent if possible a sale of the said real estates for payment of incumbrances, she had agreed to vest the charge in trustees upon the trusts thereinafter declared, she, the settlor, thereby assigned the charge to trustees upon trust, after her death, and during the lifetime of the three grandchildren and the survivor of them, to apply the interest of the charge in payment of all or any of the incumbrances affecting the said real estates of the testator, or of the interest thereof, in such manner as the trustees of the will should direct, and in default of any such direction in trust to pay the same to the person for the time being entitled to the real estate of the testator, and it was thereby declared that, after the death of the survivor of the grandchildren, the trustees should stand possessed of the charge in trust for the benefit of the person who should then be entitled to the inheritance of the said real estates of the testator under the trusts of the said will, and so that the same, so far as the same was charged upon the said real estates, should sink into and merge in the inheritance thereof; and it was thereby provided that, in the event of the said real estates or any part thereof being sold under a decree of the Court of Chancery, or by order of any other Court of competent jurisdiction, or otherwise, for the payment of the incumbrances affecting the same, during the lifetime of the three grandchildren or any of them, the trust declared in favour of the person for the time being entitled to the said real estates should determine, and the charge should not merge, but should, in case the settlor should be then living, be held in trust for her, and in case she should be then dead, be held in trust for the three grandchildren in equal shares.

The settlor died in 1867. No direction was given by the trustees of the will as to the application of the interest on the charge, and the same was enjoyed by the owner for the time being of the lands. The eldest grandchild died in 1891, leaving an only son and three daughters. The son thereupon became entitled to the lands as tenant in tail, and duly barred the entail. In 1906, he proceeded to sell the lands by voluntary sale under the Land Purchase Acts. He died in 1907, intestate and unmarried, leaving three sisters surviving him. The sale was completed by his personal representative. On the distribution of the purchase-money in 1913, the sum secured by the charge was paid to the trustees of the settlement, and all other incumbrances that had affected the land were paid off. The youngest of the three grandchildren was still alive. The sum was now claimed by (*a*) the personal representative of the son of the eldest grandchild, as the absolute owner of the lands at the time of sale, (*b*) the three daughters of the eldest grandchild, as *personae designatae* under the settlement, (*c*) the surviving grandchild, on behalf of herself and the representatives of the other grandchildren, on the ground that the contingency mentioned in the proviso to the settlement had taken effect, and (*d*) by the personal representative of the settlor. *Held*, by the Court of Appeal, affirming the Master of the Rolls, that there was a resulting trust of the sum to the estate of the settlor. *Hogg* v. *Jones*, 32 Beav. 45, considered and distinguished. *Held*, by the Master of the Rolls, that a plaintiff can withdraw an originating summons at his own volition, but on the terms of paying the costs of any defendant who had appeared. Where, however, trustees, who had issued an originating summons for the determination of the question as to who, on the construction of a settlement, was entitled to the settled fund, proceeded to withdraw the summons, and it appeared that a party who had appeared would be thereby damnified, the Master of the Rolls granted an injunction restraining the trustees from dealing with the fund, in order to enable the party so damnified to issue another summons to have the question decided. *In re Boyd's Trust. Devereux and Another* v. *Calm and Others.*

[M. R. 121; APP. 140

SETTLEMENT—Trust to pay sum of money to wife in event of husband's insolvency—How far valid - - - - 337
See MARRIAGE SETTLEMENT.

SOLICITOR'S LIEN—Principal and Agent—*Liability of Principal—Equitable Mortgage*] As against the third parties, a solicitor's lien on documents gives no higher right to the solicitor than his client himself possesses.

L'A. having been entrusted by *N.* as her agent

SOLICITOR'S LIEN—*continued.*

to invest her moneys, invested part of them in the lands of *E.*, taking a conveyance in his own name. He lodged the title-deeds with his solicitor *M'M.*, to whom he was indebted in a large sum for costs in other matters unconnected with *N.* *L'A.* was declared a trustee for *N.* of the lands of *E.* by a decree of a judge of the Chancery Division. *M'M.*, who had no notice of *L'A.*'s agency, claimed a lien on the deeds for all costs incurred by *L'A.*

Held, by the Court of Appeal, affirming Barton J., that the lien did not affect *N.*'s interest in the lands save as regards *L'A.*'s costs necessarily incurred in respect of the lands of which he was a trustee. *Rath* v. *M'Mullan*.

[Barton J. 337, App. 353.

SPECIAL OCCUPANT - - - 302
See Estate pur Autre Vie.

STATUTE — CONSTRUCTION OF — Incorporation - - - - - - 97
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See Will—Estate in Realty. 1.

—— 1 Vict. c. 26—Wills Act, s. 29—Contingent Executory Devise - - - 51
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—— 13 & 14 Vict. c. 29—Judgment-mortgage Act [376, 382
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—— 20 & 21 Vict. c. 60, ss. 268, 271, Irish Bankrupt and Insolvent Act, 1857 - 371
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—— 40 & 41 Vict. c. 56, s. 36—County Officers and Courts Act, 1877 - - 307
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—— 40 & 41 Vict. c. 56, s. 40 (*c*) (*h*)—County Officers and Courts (Ir.) Act, 1877—Administration suit - - - 92
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—— 40 & 41 Vict. c. 57, s. 27—Judicature Act, [299
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—— 44 & 45 Vict. c. 41, s. 3—Conveyancing Act, 1881 - - - - - 241
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—— 45 & 46 Vict. c. 29, s. 10 (*a*)—County Courts Amendment Act, 1882 - - 92
See County Court Jurisdiction.

—— 46 & 47 Vict. c. 60, s. 15—Labourers (Ireland) Acts - - - - - 97
See Labourers (Ireland) Acts.

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See Labourers (Ireland) Acts.

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—— 52 & 53 Vict. c. 63, s. 32—Interpretation Act - - - 180, 185
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—— 54 & 55 Vict. c. 66, s. 34—Local Registration of Title - - - - - 40
See Local Registration of Title. 2.

—— 54 & 55 Vict. c. 66, s. 86—Local Registration of Title - - - - - 359
See Local Registration of Title. 1.

—— 57 & 58 Vict. c. 30, s. 11—Finance Act, 1894 [241
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—— 59 & 60 Vict. c. 47, s. 7, sub-s. 3—Land Law Act, 1896—Sub-tenancies created by lessee - - - - - 104
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—— 3 Edw. 7, c 7, ss. 16, 24 - - 230
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—— 3 Edw. 7, c. 37, s. 21—Irish Land Act, 1903 [180, 185
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—— 3 Edw. 7, c. 37, s. 24—Irish Land Act, 1903 [269, 273
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—— 3 Edw 7, c. 37, s. 24—Irish Land Act, 1903 [153, 162
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—— 7 Edw 7, c. 56—Evicted Tenants Act, 1907
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—— 9 Edw. 7, c. 42, ss. 26, 60—Irish Land Act, 1909 - - - 153, 162
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—— 6 Geo. 5, c. 18, s. 1—Courts (Emergency Powers) Act, 1916 - - - 265
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TRANSFER OF CHANCERY ACTION to County Court - - - 307
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TURBARY REGULATIONS—Estates Commissioners' jurisdiction to make [180, 185
See LAND PURCHASE ACTS—TURBARY REGULATIONS.

VENDOR AND PURCHASER — TITLE — Costs of Verification — Abstract—*Proof that Vendor is heir-at-law of deceased Owner in Fee-simple—Proof of Payment of Succession and Estate Duty — Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 6—*Finance Act*, 1894 (57 & 58 *Vict.* c. 30), *s.* 11.] Where the vendor's title depends on the fact of his being heir-at-law of a deceased owner of the property, and the fact of his heirship is stated on the abstract, the abstract is complete, and proof of his heirship, by statutory declaration or otherwise, is merely verification of a fact stated on the face of the abstract. Accordingly, by sect. 3, sub-s. 6, of the Conveyancing and Law of Property Act, 1881, the expense of procuring such proof must be borne by the purchaser. *In re Moody and Yates's Contract*, 30 Ch. D. 344, distinguished. An abstract of title which does not show that succession and estate duty, to which the property became liable on the death of a previous owner from whom title is traced, have been paid, or that no duties were payable, is defective; and proof that such duties have been paid, or are not payable, must be furnished by the vendor free of expense to the purchaser. *In re Conlan and Faulkener's Contract* [M.R. 241

2. —— VENDOR AND PURCHASER — TITLE registered after Registration of Purchase Agreement, but before Conveyance—*Judgment Mortgage affecting the Premises — Blot on Title.*] A vendor agreed with a purchaser for the sale of leaseholds. The investigation of the title disclosed an unsatisfied judgment-mortgage affecting the premises, and registered prior to the conveyance to the vendor. The purchase agreement, pursuant to which the conveyance to the vendor had been made, was registered prior to the registration of the unsatisfied judgment-mortgage. The purchaser having by his requisitions required that the vendor should procure a release or satisfaction of the judgment-mortgage, and the vendor having declined to do so: *Held*, by the Court of Appeal, O'Brien L.C. and Moriarty L.J., *dissentiente* Cherry L.C.J. (affirming the decision of Barton J. on a vendor and purchaser summons), that a good title had not been shown. But held by O'Brien L.C. and Moriarty L.J., that the questions involved were not proper to be decided on a vendor and purchaser summons. Position of judgment creditors prior to and since the Judgment Mortgage Act, 13 & 14 Vict. c. 29, where a vendor continues in possession between an agreement for sale and actual conveyance, discussed. *In re Kissock and Currie's Contract* BARTON J. 376; APP. 382

3. VENDOR AND PURCHASER—TITLE —"Wilful Default"—*Pending Litigation as to alleged blot on Title.*] The vendor offered for sale certain premises under conditions of sale which provided that, if from any cause whatever the purchase should not be completed before a named day, the purchaser should pay interest on the balance of the purchase-money from that day. On the day on which the contract was signed, a vendor and purchaser summons was issued in reference to the sale by the same vendor of another lot held under the same title, as to whether a judgment-mortgage which affected both premises took priority to the purchase agreement and was a blot on the title. This litigation delayed completion for nearly seven months. The vendor sought to excuse the delay upon the ground that he had been advised by counsel that the judgment-mortgage did not affect the premises. *Held*, that the vendor was not justified in contracting to complete within the limited time specified, with a cloud overhanging the title; and that the vendor had been guilty of wilful default, and that consequently the purchaser was not bound to pay interest upon the purchase-money. *Kissock and Taylor's Contract* - - - BARTON J. 393

WILFUL DEFAULT - - - - 393
See VENDOR AND PURCHASER—TITLE. 3.

WILL — CONSTRUCTION — Absolute Gift or Precatory Trust.] A testator, having left all his property, real and personal, of every kind, to his wife, added the words:—"I express the wish that she should leave by her will, or transfer during her life, as she shall think fit, my house and demesne of *K.* to my son John . . . The remainder of my property I wish to be left, or transferred, to my daughters, Elinor Frances Beatrice and Margaret Lilian, in such way as" his wife should think fit. *Held*, that the widow took an absolute interest. *In the Matter of the Estate of W. D. Humphrey* - - ROSS J. 21

1. WILL—ESTATE IN REALTY—Estate in special tail—*Words of Limitation—Gift to a man and the Heirs of his Body other than his Eldest Son.*] A testator devised his fee-simple estates to "*T.R.B.E.*, my son and the heirs of his body (other than *R.B.E.*, his eldest son), whom failing to *E.C.E.*, my brother, and the heirs of his body," with a final limitation to the testator's nearest heirs in fee. *Held*, that *T.R.B.E.* took an estate

WILL—*continued.*

in special tail. The several kinds of estates tail enumerated in the Statute *De Donis* (33 Edw. 1, c. 1) are not exhaustive, but are given only as examples. *In re Elliot, Deceased; Elliot* v. *Elliot* - - - - - - - M.R. 30

2. **WILL—ESTATE IN REALTY—Nature of Estate** *taken by A—Devise to A in fee simple, but, in the event of A having no "heirs or issue," over to B upon A's death—Wills Act* (1 *Vict. c.* 26), *s.* 29.] A will, made in 1877, contained a devise, in effect, to *A* in fee simple, but, in the event of *A* having no heir or issue, over to *B*, a nephew of *A*, upon *A*'s death. *Held*, that sect. 29 of the Wills Act did not apply; that the same construction must be put upon the devise as would be put upon a devise to *A* in fee simple, but, in the event of his having no heir of his body, or issue at his death, then over to *B* in fee, and, accordingly, that *A* took an estate in fee simple, subject to a contingent executory devise over on his death. *In re John Sallery* (11 Ir. Ch. R. 236) considered. *In the Matter of the Estate of George Robert Conboy.*

[WYLIE J. 51

WILL—POWER in the nature of Trust, Appointment—*Selection—Trust—Power to appoint to one of a Class—Non-exercise of Power—Implied Trust for Class—Power engrafted on Trust.*] By his will a testator devised and bequeathed his farm of land held under a tenancy from year to year, his cattle, stock, &c., and the rest of his property, to his brother *O. K.* in trust for *J.* (eldest son of *O. K.*) until he attained 21, to be given over to him at that age if *O. K.* considered his conduct deserving of same. In the event of J. dying before 21, or *O. K.* deeming him undeserving of the bequest, the will provided as follows:—"Then I direct my said trustee to hold said farm of land and all other goods and chattels of every kind whatsoever upon trust for such other son of my said brother *O. K.* as my said brother shall appoint." J. died before attaining the age of 21. *O. K.* died without appointing to any son of his, and left three sons surviving him. *Held*, that

WILL—*continued.*

the three surviving sons of *O. K.* were entitled to the farm and other assets of the testator in equal shares as tenants in common. *In re Kieran*; *Matthews* v. *Kieran* PIM J., for BARTON J. 289

1. **WILL—WORDS—"Children"—Illegitimate Child.**] *A.*, a hospital nurse, attended *B.* during his illness. They lived together, and in 1892 a child (*E.*) was born to them, but they were not married till 1894; but *E.* was always treated as *B.*'s legitimate daughter. On June 25, 1896 (there being no prospect of any further issue), *B.* made a will leaving all his real and personal estate to his brother on trust, after payment of his debts, to realize a sum of £4000, to invest same and apply the income for the maintenance and education of his daughter *E.* during minority or until marriage, and then to pay the capital to her. The testator left the residue of his property upon trust to pay the income to *A.* for life, and then the capital to his children in equal shares, and if only one child, the whole to such child. *E.* came of age on Jan. 1, 1913. *Held*, that *A.* and *E.* were jointly entitled to be paid the funds, and to have the securities transferred to them, subject to the trusts of the will, on the ground that the word "children" included *E.*, whom the testator described as his daughter. *Dorin* v. *Dorin* (L. R. 7 H. L. 568) distinguished. *B., Deceased*; *O.* v. *D.* - - - - - Ross J. 364

2. **WILL — WORDS — "Family."**] The primary meaning of the word "family" in a will is "children." A testator bequeathed his farm of land to his nephew, and, "if he does not marry and have a family at his death," over. The nephew married, and died leaving a widow but no children. *Held*, that the gift over took effect. *In re M'Cann*: *Donnelly* v. *Moore*. [BARTON J. 255

WORDS—"Children" - - - - 364
See WILL—WORDS. 1.

—— "Family" - - - - - - 255
See WILL—WORDS. 2.

THE END.

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